

DOCUMENTS AND READINGS  
IN AMERICAN GOVERNMENT





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# DOCUMENTS AND READINGS IN AMERICAN GOVERNMENT

NATIONAL, STATE, AND LOCAL

BY

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## PREFACE

The present volume is the outgrowth of the authors' experience over many years in teaching large college classes in American Government at the University of Illinois. This experience has demonstrated the need of a book of documents and readings to supplement the textbook, since the size of the class renders it impracticable, even in the best equipped libraries, to send the students to the books and documents from which the material has been selected.

The volume covers the whole field of American government, national, state, and local, and is designed for use in connection with, and supplementary to, any of the standard texts now available in this field. The selections are intended to illustrate, amplify, and vivify the various topics treated in the textbook. The best modern and contemporary writing by the ablest authors in the field has been the source of illuminating discussions on numerous important topics. The distinctive feature of the book, however, is the emphasis placed upon primary sources and documentary material, which have been selected in preference to secondary material whenever they have been found to be available and suitable. To some extent, therefore, the volume may serve as a case-book for college classes in this field. The documents selected include such material as legislative acts, judicial opinions and decisions, executive messages and proclamations, official opinions, and proceedings of deliberative bodies. Each selection or group of selections is preceded by a brief introduction designed to enlighten the student as to its setting and significance.

It is hoped that the volume will be of assistance to large college classes in making more concrete and vivid the processes and operations of government, and in thereby arousing and holding the interest of the student.

Acknowledgments and grateful appreciation are due to the several authors, editors, and publishers who have generously permitted the reprinting of material in this volume.

J. M. M.  
C. A. B.

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DOCUMENTS AND READINGS  
IN AMERICAN GOVERNMENT

**PART I**  
**NATIONAL GOVERNMENT**

## CHAPTER I

### COLONIAL AND REVOLUTIONARY ORIGINS

#### 1. MAYFLOWER COMPACT, 1620

The Pilgrim Fathers, just before landing on Plymouth Rock in November, 1620, drew up an agreement or compact, under the terms of which a body politic was organized and a simple form of government established. This compact is notable, therefore, as the first charter for a self-governing community within this country, drawn up by the people themselves of the community concerned.

[Bradford, *History of Plymouth Plantation*, in Massachusetts Historical Collections, Fourth Series, vol. III, pp. 89-90.]

In the name of God, Amen. We whose names are underwritten, the loyall subjects of our dread soveraigne Lord, King James, by the grace of God, of Great Britaine, Franc, & Ireland king, defender of the faith &c., haveing undertaken, for the glorie of God, and advancemente of the Christian faith, and honour of our king & countrie, a voyage to plant the first colonie in the Northerne parts of Virginia, doe by these presents solemnly & mutually in the presence of God, and one of another, covenant & combine our selves togeather into a civill body politick, for our better ordering & preservation & furtherance of the ends aforesaid; and by vertue hearof to enacte, constitute, and frame such just & equall lawes, ordinances, acts, constitutions, & of-fices, from time to time, as shall be thought most meete & convenient for the generall good of the Colonie, unto which we promise all due submission and obedience. In witness whereof we have hereunder subscribed our names at Cape-Codd the 11. of November, in the year of the raigne of our soveraigne Lord, King James, of England, France & Ireland the eighteenth, and of Scotland the fiftie fourth. Ano: Dom. 1620.

#### 2. EARLY ATTEMPTS AT COLONIAL UNION

Suggestions for a colonial union of some sort were made as early as 1637, but not until 1643 was it possible to come to a definite agreement. In that year the four colonies of Plymouth, Massachusetts Bay, Connecticut, and New Haven, having in view especially the danger of an Indian war, organized the New England Confederation. Rhode Island later sought but

was refused admission, and in 1662 the number of members was reduced to three by the union of New Haven with Connecticut. The Confederation continued in existence, however, until 1684. With its passing there were continued suggestions for the union of all the colonies, which resulted in 1754 in an official conference at Albany and the formulation of a comprehensive plan of union drafted chiefly by Franklin. The proposal was not, however, completely acceptable to either the colonies or the British government, and was never ratified. The Stamp Act Congress of 1765 represents, not an attempt at governmental union, but rather an effort to make common protest against and to seek redress for a specific grievance. It is significant, however, as indicating the growing readiness of the colonists to act together on matters of common concern, and the resolutions drawn up by the Congress are especially important as a careful statement by the colonists of the "rights of Englishmen," to which they believed themselves entitled.

#### a. New England Confederation, 1643

[MacDonald, *Documentary Source-Book of American History*, 1606-1926 (The Macmillan Company), pp. 46-50.]

Whereas we all came into these parts of *America*, with one and the same end and ayme, namely, to advance the Kingdome of our Lord Jesus Christ, and to enjoy the liberties of the Gospel, in purity with peace; and whereas in our settling (by a wise providence of God) we are further dispersed upon the Sea-Coasts, and Rivers, then was at first intended, so that we cannot (according to our desire) with convenience communicate in one Government, and Jurisdiction; and whereas we live encompassed with people of severall Nations, and strange languages, which hereafter may prove injurious to us, and our posterity: And foreasmuch as the Natives have formerly committed sundry insolencies and outrages upon severall Plantations of the English, and have of late combined against us. And seeing by reason of the said distractions in *England*, which they have heard of, and by which they know we are hindred both from that humble way of seeking advice, and reaping those comfortable fruits of protection which, at other times, we might well expect; we therefore doe conceive it our bounden duty, without delay, to enter into a present Consotiation amongst our selves, for mutuall help and strength in all our future concernments, that, as in Nation, and Religion, so, in other respects, we be, and continue, One, according to the tenour and true meaning of the ensuing Articles.

I. Wherefore it is fully Agreed and Concluded by and between the parties, or Jurisdictions [of Massachusetts, Plymouth, Connecticut and New Haven] That they all be, and henceforth be called by the name of, *The United Colonies of New-England*.

II. The said United Colonies for themselves, and their posterities doe joyntly and severally hereby enter into a firme and perpetuall league of friendship and amity, for offence and defence, mutuall advice and succour, upon all just occasions, both for preserving and propagating the truth, and liberties of the Gospel, and for their own mutuall safety, and wellfare.

III. It is further agreed, That the Plantations which at present are, or hereafter shall be settled within the limits of the *Massachusetts*, shall be forever under the Government of the *Massachusetts*. And shall have peculiar Jurisdiction amongst themselves, as an intire body; and that *Plimouth*, *Connecticut*, and *New-Haven*, shall each of them, in all respects, have the like peculiar Jurisdiction, and Government within their limits. And in reference to the Plantations which already are settled, or shall hereafter be erected and shall settle within any of their limits respectively, provided that no other Jurisdiction shall hereafter be taken in, as a distinct head, or Member of this Confederation, nor shall any other either Plantation, or Jurisdiction in present being, and not already in combination, or under the Jurisdiction of any of these Confederates, be received by any of them, nor shall any two of these Confederates, joyne in one Jurisdiction, without consent of the rest. . . .

IV. It is also by these Confederates agreed, That the charge of all just Wars, whether offensive, or defensive, upon what part or Member of this Confederation soever they fall, shall both in men, provisions, and all other disbursements, be born by all the parts of this Confederation, in different proportions, according to their different abilities, in manner following, namely, That the Commissioners for each Jurisdiction, from time to time, as there shall be occasion, bring a true account and number of all the Males in each Plantation, or any way belonging to, or under their severall Jurisdictions, of what quality, or condition soever they be, from sixteen years old, to threescore, being inhabitants there. And that according to the different numbers, which from time to time shall be found in each Jurisdiction, upon a true, and just account, the service of men, and all charges of the war, be born by the poll: Each Jurisdiction, or Plantation, being left to their own just course, and customs, of rating themselves, and people, according to their different estates, with due respect to their qualities and exemptions among themselves, though the Confederation take no notice of any such priviledge. And that, according to the different charge of each Jurisdiction, and Plantation, the whole advantage of the War (if it please God so to

blesse their endeavours) whether it be in Lands, Goods, or persons, shall be proportionably divided among the said Confederates.

V. It is further agreed, That if any of these Jurisdictions, or any Plantation under, or in Combination with them, be invaded by any enemy whomsoever, upon notice, and request of any three Magistrates of that Jurisdiction so invaded. The rest of the Confederates, without any further meeting or expostulation, shall forthwith send ayde to the Confederate in danger, but in different proportion, namely the *Massachusetts* one hundred men sufficiently armed, and provided for such a service, and journey. And each of the rest five and forty men, so armed and provided, or any lesse number, if lesse be required, according to this proportion. But if such a Confederate may be supplied by their next Confederate, not exceeding the number hereby agreed, they may crave help there, and seek no further for the present. The charge to be born, as in this Article is expressed. And at their return to be victualled, and supplied with powder and shot (if there be need) for their journey by that Jurisdiction which imployed, or sent for them. . . . But in any such case of sending men for present ayde, whether before or after such order or alteration, it is agreed, That at the meeting of the Commissioners for this Confederation, the cause of such war or invasion, be duly considered, and if it appear, that the fault lay in the party so invaded, that then, that Jurisdiction, or Plantation, make just satisfaction, both to the invaders, whom they have injured, and bear all the charges of the war themselves. . . .

And further, if any Jurisdiction see any danger of an invasion approaching, and there be time for a meeting, That in such case, three Magistrates of that Jurisdiction may summon a meeting, at such convenient place, as themselves shall think meet, to consider, and provide against the threatened danger. . . .

VI. It is also agreed, That for the managing and concluding of all affaires proper to, and concerning the whole Confederation, two Commissioners shall be chosen by, and out of the foure Jurisdictions, namely two for the *Massachusetts*, two for *Plymouth*, two for *Connecticut*, and two for *New-haven* being all in Church-fellowship with us, which shall bring full power from their severall generall Courts respectively, to hear, examine, weigh, and determine all affaires of war, or peace, leagues, aydes, charges, and numbers of men for war, division of spoyles, or whatsoever is gotten by conquest, receiving of more confederates, or Plantations into Combination with any of these Confederates,



and all things of like nature, which are the proper concomitants, or consequences of such a Confederation, for amity, offence, and defence, not intermeddling with the Government of any of the Jurisdictions, which by the third Article, is preserved intirely to themselves. . . . It is further agreed, That these eight Commissioners shall meet once every year, besides extraordinary meetings, according to the fifth Article to consider, treat, and conclude of all affaires belonging to this Confederation, which meeting shall ever be the first *Thursday in September*. And that the next meeting after the date of these presents, which shall be accounted the second meeting, shall be at *Boston* in the *Massachusetts*, the third at *Hartford*, the fourth at *New-haven*, the fifth at *Plimouth*, the sixth and seventh at *Boston*; and then *Hartford*, *New-haven*, and *Plymouth*, and so in course successively. If in the mean time, some middle place be not found out, and agreed on, which may be commodious for all the Jurisdictions.

. . . . .

VIII. It is also agreed, That the Commissioners for this Confederation hereafter at their meetings, whether ordinary or extraordinary, as they may have Commission or opportunity, doe endeavour to frame and establish Agreements and Orders in generall cases of a civil nature, wherein all the Plantations are interested, for preserving peace amongst themselves, and preventing (as much as may be) all occasions of war, or differences with others, as about the free and speedy passage of Justice in each Jurisdiction, to all the Confederates equally, as to their own, receiving those that remove from one Plantation to another, without due Certificates, how all the Jurisdictions may carry it towards the *Indians*, that they neither grow insolent, nor be injured without due satisfaction, least War break in upon the Confederates, through such miscarriages. It is also agreed, That if any Servant run away from his Master, into any other of these Confederated Jurisdictions, That in such case, upon the Certificate of one Magistrate in the Jurisdiction, out of which the said Servant fled, or upon other due proof, the said Servant shall be delivered either to his Master, or any other that pursues, and brings such Certificate, or proof. And that upon the escape of any Prisoner whatsoever, or fugitive, for any Criminall Cause, whether breaking Prison, or getting from the Officer, or otherwise escaping, upon the Certificate of two Magistrates of the Jurisdiction out of which the escape is made, that he was a prisoner

or such an offender, at the time of the escape. The Magistrates, or some of them, of that Jurisdiction where for the present the said prisoner or fugitive abideth, shall forthwith grant such a Warrant, as the case will bear, for the apprehending of any such person, and the delivery of him into the hand of the Officer, or other person who pursueth him. And if help be required for the safe returning of any such offender, it shall be granted unto him that craves the same, he paying the charges thereof.

IX. And for that the justest Wars may be of dangerous consequence, especially to the smaller Plantations in these United Colonies, it is agreed, That neither the *Massachusetts*, *Plymouth*, *Connecticut*, nor *New-Haven*, nor any of the Members of any of them, shall at any time hereafter begin undertake or engage themselves, or this Confederation, or any part thereof in any War whatsoever (sudden exigents with the necessary consequences thereof excepted, which are also to be moderated, as much as the case will permit) without the consent and agreement of the forenamed eight Commissioners, or at least six of them, as in the sixth Article is provided. . . .

XI. It is further agreed, That if any of the Confederates shall hereafter break any of these presents Articles, or be any other way injurious to any one of the other Jurisdictions such breach of Agreement, or injury shall be duly considered, and ordered by the Commissioners for the other Jurisdictions, that both peace, and this present Confederation, may be intirely preserved without violation.

#### b. Albany Plan of Union, 1754

[MacDonald, *Select Charters Illustrative of American History* (The Macmillan Company), pp. 254-257.]

PLAN of a proposed UNION of the several Colonies of Massachusetts Bay, New Hampshire, Connecticut, Rhode Island, New York, New Jerseys, Pennsylvania, Maryland, Virginia, North Carolina, and South Carolina, for their mutual defence and security, and for extending the British Settlements in North America.

That humble application be made for an Act of the Parliament of Great Britain, by virtue of which, one General Government

may be formed in America, including all the said Colonies, within, and under which Government each Colony may retain its present constitution, except in the particulars wherein a charge [*change*] may be directed by the said Act, as hereafter follows.

That the said General Government be administered by a president General, to be appointed & supported by the Crown, and a grand Council to be chosen by the representatives of the people of the several Colonies, meet [*met*] in their respective assemblies.

That within Months after the passing of such Act, The house of representatives in the several Assemblies, that Happen to be sitting within that time or that shall be specially for that purpose convened, may and shall chose, Members for the Grand Council in the following proportions, that is to say:

Massachusetts Bay .....	7.
New Hampshire .....	2.
Connecticut .....	5.
Rhode Island .....	2.
New York .....	4.
New Jerseys .....	3.
Pennsylvania .....	6.
Maryland .....	4.
Virginia .....	7.
North Carolina .....	4.
South Carolina .....	4.

---

48.

Who shall meet for the present time at the City of Philadelphia in Pennsylvania, being called by the President General as soon as conveniently may be after his appointment.

That there shall be a New Election of the Members of the Grand Council every three years, and on the death or resignation of any Member, his place should be supplied by a new choice at the next sitting of the Assembly of the Colony he represented.

That after the first three years, when the proportion of money arising out of each Colony to the General Treasury can be known, the number of Members to be chosen, for each Colony shall from time to time in all ensuing Elections be regulated by that proportion (yet so as that the Number to be chosen by any one province be not more than seven nor less than two).

That the Grand Council shall meet once in every year, and oftener if occasion require, at such time and place as they shall adjourn to at the last preceeding meeting, or as they shall be called to meet at by the President General, on any emergency, he

having first obtained in writing the consent of seven of the Members to such call, and sent due and timely notice to the whole.

That the Grand Council have power to chuse their speaker, and shall neither be dissolved prorogued, nor continue sitting longer than six weeks at one time without their own consent, or the special command of the Crown.

That the Members of the Grand Council shall be allowed for their service ten shillings sterling per diem, during their Sessions or [and] Journey to and from the place of Meeting; twenty miles to be reckoned a days Journey.

That the Assent of the President General be requisite to all Acts of the Grand Council, and that it be his Office and duty to cause them to be carried into execution.

That the President General with the advice of the Grand Council, hold or direct all Indian Treaties in which the general interest of the Colonys may be concerned; and make peace or declare War with Indian Nations. That they make such Laws as they judge necessary for the regulating all Indian Trade. That they make all purchases from Indians for the Crown, of lands not [now] within the bounds of particular Colonies, or that shall not be within their bounds when some of them are reduced to more convenient dimensions. That they make new settlements on such purchases by granting Lands, [in the King's name] reserving a Quit rent to the Crown, for the use of the General Treasury.

That they make Laws for regulating & governing such new settlements, till the Crown shall think fit to form them into particular Governments.

That they raise and pay Soldiers, and build Forts for the defence of any of the Colonies, and equip vessels of Force to guard the Coasts and protect the Trade on the Ocean, Lakes, or great Rivers; but they shall not impress men in any Colonies without the consent of its Legislature. That for these purposes they have power to make Laws and lay and Levy such general duties, imposts or taxes, as to them shall appear most equal and just, considering the ability and other circumstances of the Inhabitants in the several Colonies, and such as may be collected with the least inconvenience to the people, rather discouraging luxury, than loading Industry with unnecessary burthens.—That they might appoint a General Treasurer and a particular Treasurer in each Government when necessary, and from time to time may order the sums in the Treasuries of each Government, into the General Treasury, or draw on them for special payments as they find most

convenient; yet no money to issue but by joint orders of the President General and Grand Council, except where sums have been appropriated to particular purposes, and the President General is previously empowered by an Act to draw for such sums.

That the General accounts shall be yearly settled and reported to the several Assemblies.

That a Quorum of the Grand Council empowered to act with the President General, do consist of twenty five Members, among whom there shall be one or more from a majority of the Colonies. That the laws made by them for the purposes aforesaid, shall not be repugnant, but as near as may be agreeable to the Laws of England, and shall be transmitted to the King in Council for approbation, as soon as may be after their passing, and if not disapproved within three years after presentation to remain in Force.

That in case of the death of the President General, the Speaker of the Grand Council for the time being shall succeed, and be vested with the same powers and authority, to continue until the King's pleasure be known.

That all Military Commission Officers, whether for land or sea service, to act under this General constitution, shall be nominated by the President General, but the approbation of the Grand Council is to be obtained before they receive their Commissions; and all Civil Officers are to be nominated by the Grand Council, and to receive the President General's approbation before the officiate; but in case of vacancy by death or removal of any Officer Civil or Military under this constitution, The Governor of the Province in which such vacancy happens, may appoint till the pleasure of the President General and Grand Council can be known.—That the particular Military as well as Civil establishments in each Colony remain in their present State this General constitution notwithstanding. And that on sudden emergencies any Colony may defend itself, and lay the accounts of expence thence arisen, before the President General and Grand Council, who may allow and order payment of the same as far as they judge such accounts just and reasonable.

### c. Resolutions of the Stamp Act Congress, 1765

[MacDonald, *Documentary Source Book of American History*, 1806-1926 (The Macmillan Company), pp. 137-139.]

The members of this Congress, sincerely devoted, with the warmest sentiments of affection and duty to his Majesty's person

and government, inviolably attached to the present happy establishment of the Protestant succession, and with minds deeply impressed by a sense of the present and impending misfortunes of the British colonies on this continent; having considered as maturely as time will permit, the circumstances of the said colonies, esteem it our indispensable duty to make the following declarations of our humble opinion, respecting the most essential rights and liberties of the colonists, and of the grievances under which they labour, by reason of several late acts of parliament.

I. That his Majesty's subjects in these colonies, owe the same allegiance to the crown of Great Britain, that is owing from his subjects born within the realm, and all due subordination to that august body the parliament of Great-Britain.

II. That his Majesty's liege subjects in these colonies, are intitled to all the inherent rights and liberties of his natural born subjects, within the kingdom of Great-Britain.

III. That it is inseparably essential to the freedom of a people, and the undoubted right of Englishmen, that no Taxes be imposed on them but with their own consent, given personally, or by their representatives.

IV. That the people of these colonies are not, and, from their local circumstances, cannot be, represented in the House of Commons in Great-Britain.

V. That the only representatives of the people of these colonies are persons chosen therein by themselves, and that no taxes ever have been, or can be constitutionally imposed on them, but by their respective legislatures.

VI. That all supplies to the crown being free gifts of the people, it is unreasonable and inconsistent with the principles and spirit of the British constitution, for the people of Great-Britain to grant to his Majesty the property of the colonists.

VII. That trial by jury, is the inherent and invaluable right of every British subject in these colonies.

VIII. That . . . [the Stamp Act] . . . , by imposing taxes on the inhabitants of these colonies, and the said act, and several other acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists.

IX. That the duties imposed by several late acts of parliament, from the peculiar circumstances of these colonies, will be extremely burthensome and grievous; and from the scarcity of specie, the payment of them absolutely impracticable.

X. That as the profits of the trade of these colonies ultimately center in Great-Britain, to pay for the manufactures which they are obliged to take from thence, they eventually contribute very largely to all supplies granted there to the crown.

XI. That the restrictions imposed by several late acts of parliament on the trade of these colonies, will render them unable to purchase the manufactures of Great-Britain.

XII. That the increase, prosperity and happiness of these colonies, depend on the full and free enjoyments of their rights and liberties, and an intercourse with Great-Britain mutually affectionate and advantageous.

XIII. That it is the right of the British subjects in these colonies to petition the king, or either house of parliament. Lastly, that it is the indispensable duty of these colonies, to the best of sovereigns, to the mother country, and to themselves, to endeavour by a loyal and dutiful address to his Majesty, and humble applications to both houses of parliament, to procure the repeal of the act for granting and applying certain stamp duties, of all clauses of any other acts of parliament, whereby the jurisdiction of the admiralty is extended as aforesaid, and of the other late acts for the restriction of American commerce.

### 3. COMMITTEES OF CORRESPONDENCE

During the early revolutionary period (1772-1775), when the regularly constituted authorities were for the most part still controlled by the British, it became necessary for the revolutionists to establish some means of communication in order to keep informed on matters of common concern and to agree on common action with respect to those matters. Soon there grew up a complete network of such committees, both local and colonial in their scope, that through their correspondence with one another not only served as channels of communication and information, but also became in fact the means of carrying on a government that functioned quite as actively as that in the hands of the British.

#### a. Origin of Committees of Correspondence

[*Writings of Thomas Jefferson* (Ford ed., published by G. P. Putnam's Sons), vol. I, pp. 7-9.]

Nothing of particular excitement occurring for a considerable time our countrymen seemed to fall into a state of insensibility to our situation. The duty on tea not yet repealed & the Declaratory act of a right in the British parl to bind us by their laws in all cases whatsoever, still suspended over us. But a court of inquiry held in R. Island in 1762, with a power to send



persons to England to be tried for offences committed here was considered at our session of the spring of 1773. as demanding attention. Not thinking our old & leading members up to the point of forwardness & zeal which the times required, Mr. Henry, R. H. Lee, Francis L. Lee, Mr. Carr & myself agreed to meet in the evening in a private room of the Raleigh to consult on the state of things. There may have been a member or two more whom I do not recollect. We were all sensible that the most urgent of all measures was that of coming to an understanding with all the other colonies to consider the British claims as a common cause to all, & to produce an unity of action: and for this purpose that a commee of correspondee in each colony would be the best instrument for intercommunication: and that their first measure would probably be to propose a meeting of deputies from every colony at some central place, who should be charged with the direction of the measures which should be taken by all. We therefore drew up the resolutions which may be seen in Wirt pa 87. The consulting members proposed to me to move them, but I urged that it should be done by Mr. Carr, my friend & brother in law, then a new member to whom I wished an opportunity should be given of making known to the house his great worth & talents. It was so agreed; he moved them, they were agreed to nem. con. and a commee of correspondence appointed of whom Peyton Randolph, the Speaker, was chairman. The Govr. (then Ld. Dummore) dissolved us, but the commee met the next day, prepared a circular letter to the Speakers of the other colonies, inclosing to each a copy of the resolns and left it in charge with their chairman to forward them by expresses.

The origination of these commees of correspondence between the colonies has been since claimed for Massachusetts, and Marshall II. 151, has given into this error, altho' the very note of his appendix to which he refers, shows that their establmt was confined to their own towns. This matter will be seen clearly stated in a letter of Samuel Adams Wells to me of Apr. 2., 1819, and my answer of May 12. I was corrected by the letter of Mr. Wells in the information I had given Mr. Wirt, as stated in his note, pa. 87, that the messengers of Massach. & Virga crossed each other on the way bearing similar propositions, for Mr. Wells shows that Mass. did not adopt the measure but on the receipt of our proposn delivered at their next session. Their message therefore which passed ours, must have related to something else, for I well remember P. Randolph's informing me of the crossing of our messengers.



### b. Structure of Committees of Correspondence

[*Report, American Historical Association, 1901, vol. I, p. 257.*]

The system at this point [1774] reached a well-nigh perfect adjustment. The elasticity of its operation in New Jersey makes that colony a model for its exposition. The inhabitants of each township elected a township committee of correspondence for the special purpose of corresponding with other township committees within the county. It could, however, extend its correspondence when necessary. The county committee was formed by the township committees from members chosen of their own number. This county committee would then correspond with the other county committees in the province, and when deemed necessary could call a county meeting or convention. It reacted through the township committees on the individual inhabitants. The county committees chose in turn certain of their own number to form a provincial committee of correspondence. The especial function of this body was to correspond with the other colonies and call a provincial congress for New Jersey when necessary. It reacted on its own colony through the medium of the county and township committees. The superiority of the provincial committee of correspondence over the assembly committees is obvious. It was always in session as a standing committee, and by referendum could at any time test the wishes of the people, since the town and county branches of the organization kept constantly in touch with them. The provincial congress on August 12, 1775, defined the qualifications of electors and the powers and functions of the different grades of committees. Thus perfected, the system was a rapidly working and highly efficient piece of administrative machinery. Connected with the popular cause through representation in Congress, the action of the system was equally facile toward the central government at one end of the chain of committees and toward the individual at the other, the county committees being responsible for the execution of the resolutions and orders of the continental and provincial congresses.

### c. Functions of the Committees of Correspondence

[*Minutes of the Albany Committee of Correspondence, vol. I, pp. v-vi.*]

One is . . . impressed with the orderly and legal way in which the Revolution was carried on. At the beginning the committee

seemingly merely regarded itself as a military committee to assist in raising the supporting troops. It was very particular not to interfere at first with the civil and judicial functions of government. It was only later, when the officials in charge of such matters either fled or failed to perform their duties, that the committee felt called upon to intervene, and then only generally to the extent of seeing that other officials were properly chosen.

No committee of revolutionaries showed a more careful regard for the fact that they owed their powers to the people who elected them and no suggestion is even found that the members should continue in power beyond the time for which they were chosen.

Everything pertaining to the successful prosecution of the war they felt to be within their province. It is an almost bewildering array of activities. (1) The raising, drafting, equipping, disciplining, training, officering, stationing and paying of troops. (2) The exemptions from military duty of those in essential industries or employment. (3) The detection, imprisonment, punishment and exile of the disaffected, spies and emissaries. (4) The suppression of organized revolts within the county and the prosecution of those guilty of speaking adversely of the patriot cause. (5) The support of those made poor by the war, the burial of their dead, and the helping of refugees. (6) The collection of the excise and the regulation of taverns. (7) The supervision of the construction of hospitals, barracks, forts and prisons. (8) The assumption of authority over the ordinances and powers of the city officers and the control of firemasters and fire regulations. (9) The regulation of prices for all kinds of articles, particularly of tea, sugar and salt. (10) The regulation and encouragement of trade and manufactures, and the inspection for bad products. (11) The handling of appeals to control housing difficulties, fix wages and prevent hoarding. (12) The encouragement of auxiliary aid such as the knitting of socks for the soldiers, collecting linen rags, medicines, and instruments. (13) The control of the issuance of paper money and of counterfeiting. (14) The quarantining against smallpox. (15) The rationing of food, particularly of wheat, and preventing its distillation into whiskey. (16) Subscriptions for the poor at home and in Boston. (17) The supervision of elections of members in subdistricts and for members of the Provincial Congress and the Legislature. (18) The maintenance of law and order. (19) The establishment of night watches. (20) The management of Indian affairs and relations.

A large part of the time of the committee was taken up, as

might be expected, with the tories, prisoners, deserters, murders, passes, rangers, protection of the loyal, robberies, plunder, sequestration of tory property and treason, all very similar in character to the work carried on by the commissioners for detecting conspiracies. The patience exhibited in this work is at times surprising and if cruel treatment in the prisons is sometimes alleged, it must be attributed to lack of facilities rather than to intent.

#### 4. THE CONTINENTAL CONGRESSES

At the suggestion of the Massachusetts House of Representatives, delegates chosen from the several colonies (all except Georgia being represented) met at Philadelphia in September, 1774, for the purpose of deliberating and determining upon measures to be taken for the restoration of harmony between Great Britain and the colonies. This first Continental Congress, as it was called, adopted an impressive declaration of rights, and, in an effort to force redress of their grievances, agreed further upon a boycott of British trade, the delegates organizing themselves into a so-called "Continental Association" for the purpose of enforcing such boycott. A second Continental Congress was called to carry on these measures of petition and protest, but when it met in May, 1775, hostilities had begun, and there being no other agency to act for the colonies, this Congress therefore assumed the functions of a central governing body, acting as such until the ratification of the Articles of Confederation in 1781.

##### a. Declaration and Resolves of the First Continental Congress

[*Journals of the Continental Congress*, vol. I, pp. 63-73.]

Whereas, since the close of the last war, the British parliament, claiming a power, of right, to bind the people of America by statutes in all cases whatsoever, hath, in some acts, expressly imposed taxes on them, and in others, under various pretences, but in fact for the purpose of raising a revenue, hath imposed rates and duties payable in these colonies, established a board of commissioners, with unconstitutional powers, and extended the jurisdiction of courts of admiralty, not only for collecting the said duties, but for the trial of causes merely arising within the body of a county.

And whereas, in consequence of other statutes, judges, who before held only estates at will in their offices, have been made dependant on the crown alone for their salaries, and standing armies kept in times of peace: And whereas it has lately been resolved in parliament, that by force of a statute, made in the thirty-fifth year of the reign of King Henry the Eighth, colonists

may be transported to England, and tried there upon accusations for treasons and misprisions, or concealments of treasons committed in the colonies, and by a late statute, such trials have been directed in cases therein mentioned:

And whereas, in the last session of parliament, three statutes were made . . . [the Boston Port Act, the Massachusetts Government Act, and the Administration of Justice Act;] . . . and another statute was then made . . . [the Quebec Act] . . . All which statutes are impolitic, unjust, and cruel, as well as unconstitutional, and most dangerous and destructive of American rights:

And whereas, assemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances; and their dutiful, humble, loyal, and reasonable petitions to the crown for redress, have been repeatedly treated with contempt, by his Majesty's ministers of state:

The good people of the several colonies of New-Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Newcastle, Kent, and Sussex on Delaware, Maryland, Virginia, North-Carolina, and South-Carolina, justly alarmed at these arbitrary proceedings of parliament and administration, have severally elected, constituted, and appointed deputies to meet, and sit in general Congress, in the city of Philadelphia, in order to obtain such establishment, as that their religion, laws, and liberties, may not be subverted: Whereupon the deputies so appointed being now assembled, in a full and free representation of these colonies, taking into their most serious consideration, the best means of attaining the ends aforesaid, do, in the first place, as Englishmen, their ancestors in like cases have usually done, for asserting and vindicating their rights and liberties, DECLARE,

That the inhabitants of the English colonies in North-America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS:

*Resolved, N.C.D.* 1. That they are entitled to life, liberty and property: and they have never ceded to any foreign power whatever, a right to dispose of either without their consent.

*Resolved, N.C.D.* 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of Eng-

*Resolved, N.C.D.* 3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.

*Resolved, 4.* That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed: But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British parliament, as are bona fide, restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation internal or external, for raising a revenue on the subjects, in America, without their consent.

*Resolved, N.C.D.* 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

*Resolved, 6.* That they are entitled to the benefit of such of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.

*Resolved, N.C.D.* 7. That these, his majesty's colonies, are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.

*Resolved, N.C.D.* 8. That they have a right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.

*Resolved, N.C.D.* 9. That the keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.

*Resolved, N.C.D.* 10. It is indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legislature be independent of each other; that, therefore, the exercise of legislative power in several colonies, by a council appointed, during pleasure, by the crown, is unconstitutional, dangerous and destructive to the freedom of American legislation.

All and each of which the aforesaid deputies, in behalf of themselves, and their constituents, do claim, demand, and insist on, as their indubitable rights and liberties; which cannot be legally taken from them, altered or abridged by any power whatever, without their own consent, by their representatives in their several provincial legislatures.

In the course of our inquiry, we find many infringements and violations of the foregoing rights, which, from an ardent desire, that harmony and mutual intercourse of affection and interest may be restored, we pass over for the present, and proceed to state such acts and measures as have been adopted since the last war, which demonstrate a system formed to enslave America.

*Resolved, N.C.D.* That the following acts of parliament are infringements and violations of the rights of the colonists; and that the repeal of them is essentially necessary, in order to restore harmony between Great-Britain and the American colonies, viz. . . . [The Stamp Act, the Townshend Revenue Act, the coercive acts of 1774, the Quebec Act, &c.] . . .

Also, that the keeping a standing army in several of these colonies, in time of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.

. . . . .

## b. The Continental Association

[*Journals of the Continental Congress*, vol. I, pp. 75-80.]

WE, his majesty's most loyal subjects, the delegates of the several colonies of New-Hampshire, Massachusetts-Bay, Rhode-Island, Connecticut, New-York, New-Jersey, Pennsylvania, the three lower counties of Newcastle, Kent and Sussex on Delaware, Maryland, Virginia, North-Carolina, and South-Carolina, deputed to represent them in a continental Congress, held in the city of Philadelphia, on the fifth day of September, 1774, avowing our allegiance to his majesty, our affection and regard for our fellow-subjects in Great Britain and elsewhere, affected with the deepest anxiety, and most alarming apprehensions, at those

grievances and distresses, with which his majesty's American subjects are oppressed; and having taken under our most serious deliberation, the state of the whole continent, find, that the present unhappy situation of our affairs is occasioned by a ruinous system of colony administration, adopted by the British ministry about the year 1763, evidently calculated for enslaving these colonies, and, with them, the British Empire. In prosecution of which system, various acts of parliament have been passed, for raising a revenue in America, for depriving the American subjects, in many instances, of the constitutional trial by jury, exposing their lives to danger, by directing a new and illegal trial beyond the seas, for crimes alleged to have been committed in America: And in prosecution of the same system, several late, cruel, and oppressive acts have been passed, respecting the town of Boston and the Massachusetts-Bay, and also an act for extending the province of Quebec, so as to border on the western frontiers of these colonies, establishing an arbitrary government therein, and discouraging the settlement of British subjects in that wide extended country; thus, by the influence of civil principles and ancient prejudices, to dispose the inhabitants to act with hostility against the free Protestant colonies, whenever a wicked ministry shall chuse so to direct them.

To obtain redress of these grievances, which threaten destruction to the lives, liberty, and property of his majesty's subjects, in North-America, we are of opinion, that a non-importation, non-consumption, and non-exportation agreement, faithfully adhered to, will prove the most speedy, effectual, and peaceable measure: And, therefore, we do, for ourselves, and the inhabitants of the several colonies, whom we represent, firmly agree and associate, under the sacred ties of virtue, honour and love of our country, as follows:

1. That from and after the first day of December next, we will not import, into British America, from Great-Britain or Ireland, any goods, wares, or merchandize whatsoever, or from any other place, any such goods, wares, or merchandize, as shall have been exported from Great-Britain or Ireland; nor will we, after that day, import any East-India tea from any part of the world; nor any molasses, syrups, paneles, coffee, or pimento, from the British plantations or from Dominica; nor wines from Madeira, or the Western Islands; nor foreign indigo.

2. We will neither import nor purchase, any slave imported after the first day of December next; after which time, we will wholly discontinue the slave trade, and will neither be concerned



in it ourselves, nor will we hire our vessels, nor sell our commodities or manufactures to those who are concerned in it.

3. As a non-consumption agreement, strictly adhered to, will be an effectual security for the observation of the non-importation, we, as above, solemnly agree and associate, that from this day, we will not purchase or use any tea, imported on account of the East-India company, or any on which a duty hath been or shall be paid; and from and after the first day of March next, we will not purchase or use any East-India tea whatever; nor will we, nor shall any person for or under us, purchase or use any of those goods, wares, or merchandize, we have agreed not to import, which we shall know, or have cause to suspect, were imported after the first day of December, except such as come under the rules and directions of the tenth article hereafter mentioned.

4. The earnest desire we have not to injure our fellow-subjects in Great-Britain, Ireland, or the West-Indies, induces us to suspend a non-exportation, until the tenth day of September, 1775; at which time, if the said acts and parts of acts of the British parliament herein after mentioned, are not repealed, we will not directly or indirectly, export any merchandize or commodity whatsoever to Great-Britain, Ireland, or the West-Indies, except rice to Europe.

5. Such as are merchants, and use the British and Irish trade, will give orders, as soon as possible, to their factors, agents and correspondents, in Great-Britain and Ireland, not to ship any goods to them, on any pretence whatsoever, as they cannot be received in America; and if any merchant, residing in Great-Britain or Ireland, shall directly or indirectly ship any goods, wares, or merchandize, for America, in order to break the said non-importation agreement, or in any manner contravene the same, on such unworthy conduct being well attested, it ought to be made public; and, on the same being so done, we will not, from thenceforth, have any commercial connexion with such merchant.

6. That such as are owners of vessels will give positive orders to their captains, or masters, not to receive on board their vessels any goods prohibited by the said non-importation agreement, on pain of immediate dismissal from their service.

7. We will use our utmost endeavours to improve the breed of sheep, and increase their number to the greatest extent; and to that end, we will kill them as seldom as may be, especially those of the most profitable kind; nor will we export any to the West-Indies or elsewhere; and those of us, who are or may be



come overstocked with, or can conveniently spare any sheep, will dispose of them to our neighbours, especially to the poorer sort, on moderate terms.

8. We will, in our several stations, encourage frugality, oeconomy, and industry, and promote agriculture, arts and the manufactures of this country, especially that of wool; and will discountenance and discourage every species of extravagance and dissipation, especially all horse-racing, and all kinds of gaming, cock fighting, exhibitions of shews, plays, and other expensive diversions and entertainments; and on the death of any relation or friend, none of us, or any of our families will go into any further mourning-dress, than a black crape or ribbon on the arm or hat, for gentlemen, and a black ribbon and necklace for ladies, and we will discontinue the giving of gloves and scarves at funerals.

9. Such as are venders of goods or merchandize will not take advantage of the scarcity of goods, that may be occasioned by this association, but will sell the same at the rates we have been respectively accustomed to do, for twelve months last past.— And if any vender of goods or merchandize shall sell such goods on higher terms, or shall, in any manner, or by any device whatsoever, violate or depart from this agreement, no person ought, nor will any of us deal with any such person, or his or her factor or agent, at any time thereafter, for any commodity whatever.

10. In case any merchant, trader, or other person, shall import any goods or merchandize, after the first day of December, and before the first day of February next, the same ought forthwith, at the election of the owner, to be either re-shipped or delivered up to the committee of the country or town, wherein they shall be imported, to be stored at the risque of the importer, until the non-importation agreement shall cease, or be sold under the direction of the committee aforesaid; and in the last-mentioned case, the owner or owners of such goods shall be reimbursed out of the sales, the first cost and charges, the profit, if any, to be applied towards relieving and employing such poor inhabitants of the town of Boston, as are immediate sufferers by the Boston port-bill; and a particular account of all goods so returned, stored, or sold, to be inserted in the public papers; and if any goods or merchandizes shall be imported after the said first day of February, the same ought forthwith to be sent back again, without breaking any of the packages thereof.

11. That a committee be chosen in every county, city, and town, by those who are qualified to vote for representatives in

the legislature, whose business it shall be attentively to observe the conduct of all persons touching this association; and when it shall be made to appear, to the satisfaction of a majority of any such committee, that any person within the limits of their appointment has violated this association, that such majority do forthwith cause the truth of the case to be published in the gazette; to the end, that all such foes to the rights of British-America may be publicly known, and universally contemned as the enemies of American liberty; and thenceforth we respectively will break off all dealings with him or her.

12. That the committee of correspondence, in the respective colonies, do frequently inspect the entries of their custom-houses, and inform each other, from time to time, of the true state thereof, and of every other material circumstance that may occur relative to this association.

13. That all manufactures of this country be sold at reasonable prices, so that no undue advantage be taken of a future scarcity of goods.

14. And we do further agree and resolve, that we will have no trade, commerce, dealings or intercourse whatsoever, with any colony or province, in North-America, which shall not accede to, or which shall hereafter violate this association, but will hold them as unworthy of the rights of freemen, and as inimical to the liberties of their country.

[This association to be adhered to until the acts complained of are repealed.]

## 5. DECLARATION OF INDEPENDENCE

For some time after the actual outbreak of hostilities, there were many of the influential revolutionary leaders who still hoped for reconciliation with England, and as a final effort in that direction the Second Continental Congress, on July 8, 1775, adopted another petition to the King, setting forth the grievances of the colonies in a conciliatory manner and asking for redress. However, on August 23, the very day on which the petition was to be presented, the King issued his proclamation of rebellion against the colonies, and later refused an audience to the colonial representatives. All hopes of reconciliation being thus abandoned, Richard Henry Lee of Virginia, on June 7, 1776, moved several resolutions, the first declaring "That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved." This resolution was, on June 10, referred to a committee consisting of Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert R. Livingston, which committee reported on June 28 the draft of a declaration

written almost entirely by Jefferson. Lee's resolution was debated vigorously in Congress, with the more moderate revolutionists, led by John Dickinson, arguing for further delay. It was finally adopted on July 2, and on July 4 the formal declaration, with some slight changes from Jefferson's draft, was likewise adopted, and signed by John Hancock as president of the Continental Congress, the other members attaching their signatures later.

*[Journals of the Continental Congress, vol. V, pp. 510-515.]*

*In Congress, July 4, 1776,*

## THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA,

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of

repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws of Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our People, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislature.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws giving his Assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by jury:

For transporting us beyond Seas to be tried for pretended offences:

For abolishing the free System of English Laws in a neighboring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislature, and declaring themselves invested with Power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose char-

acter is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People.

Nor have We been wanting in attention to our Brittish brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

JOHN HANCOCK.<sup>2</sup>

<sup>1</sup> The remaining signatures are omitted.

## CHAPTER II

### MAKING AND DEVELOPMENT OF THE CONSTITUTION

#### 6. ARTICLES OF CONFEDERATION

Shortly after the Second Continental Congress met in 1775, Franklin proposed a plan of union similar to his earlier Albany Plan. Nothing was done, however, until Richard Henry Lee, at the same time that he proposed his famous resolution for independence, offered another to form a confederation. This was adopted by the Continental Congress on June 11, 1776, and a committee was appointed on the following day to prepare a plan. John Dickinson, as chairman of this committee, drafted a plan which was reported to Congress on July 12, 1776, debated at intervals, and finally adopted with some amendments on November 15, 1777. Although it was agreed that the plan should be submitted to the state legislatures for their approval, this was not done until several months later. Most of the states ratified promptly, but Maryland withheld its approval until agreement was reached on the conflicting claims to the Western lands. With the cession or promise of cession of these lands to the United States, Maryland ratified on March 1, 1781, and the Articles became effective the following day.

[*Journals of the Continental Congress*, vol. XIX, pp. 214-222.]

*Articles of Confederation and perpetual Union between the States of Newhamshire, Massachusetts-bay, Rhodelsland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.*

ARTICLE I. The stile of this confederacy shall be "The United States of America."

ARTICLE II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

ARTICLE III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other state of which the owner is an inhabitant; provided also that no imposition, dutes, or restriction shall be laid by any State, on the property of the United States, or either of them.

If any Person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

ARTICLE V. For the more convenient management of the general interest of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled. each State shall have one vote.



Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince, or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be con-

sulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ARTICLE VII. When land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

ARTICLE VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

ARTICLE IX. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of grant-

courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners, or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be

administered by one of the judges of the supreme or superior court of the State, where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward:" provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdiction as they may respect such lands, and the States which passed such grants are adjusted; the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States—fixing the standard of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated—establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces, in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "a Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction—to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money

ate and apply the same for defraying the public expenses—to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted,—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expense of the United States; and the officers and men so clothed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled; but if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so clothed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal

of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

ARTICLE X. The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.

ARTICLE XI. Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

ARTICLE XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

ARTICLE XIII. Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

## 7. CALL FOR CONSTITUTIONAL CONVENTION

The Articles of Confederation were early found to be defective, especially in the provisions with respect to taxation and commerce. Proposals to remedy these defects by amendment failed on account of the requirement for unanimous ratification. In view of the continuing difficulties with respect to their trade relations in particular, the states found it necessary

to adjust these difficulties in some other manner. Consequently, delegates from Virginia and Maryland met at Mt. Vernon in 1785, and agreed upon certain matters with respect to navigation on the Potomac. Partly as a result of this conference, and at the suggestion of the Virginia Assembly, another much more important conference was held the next year at Annapolis, as a general conference of the states to consider trade and commercial relations. This Annapolis Convention, as it was called, found the problem of commercial relations to be only one of many, and proposed therefore another convention for the purpose of revising the Articles. Congress accepted this suggestion, and issued its call for such a convention to meet in Philadelphia in the following year.

### a. Report of Annapolis Convention, 1786

*[Debates in the Federal Convention of 1787 reported by James Madison (Hunt & Scott ed., published by Carnegie Endowment for International Peace), pp. xlix-lit.]*

*To the Honorable the Legislatures of Virginia, Delaware, Pennsylvania, New Jersey, and New York*

The commissioners from the said states respectively, assembled at Annapolis, humbly beg leave to report,

That, pursuant to their several appointments, they met, at Annapolis in the State of Maryland, on the 11th day of September instant; and having proceeded to a Communication of their powers, they found that the States of New York, Pennsylvania, and Virginia, had, in substance, and nearly in the same terms, authorized their respective commissioners "to meet such Commissioners as were or might be appointed by the other States in the Union, at such time and place as should be agreed upon by the said Commissioners, to take into consideration the trade and Commerce of the United States, to consider how far an uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony, and to report to the several States such an Act, relative to this great object as, when unanimously ratified by them would enable the United States in Congress assembled effectually to provide for the same."

That the State of Delaware had given similar powers to their Commissioners, with this difference only, that the Act to be framed in virtue of these powers, is required to be reported "to the United States in Congress assembled, to be agreed to by them, and confirmed by the Legislatures of every State."

That the State of New Jersey had enlarged the object of their appointment, empowering their Commissioners "to consider how



far a uniform system in their commercial regulations and *other important matters* might be necessary to the common interest and permanent harmony of the several States," and to report such an Act on the subject as, when ratified by them "would enable the United States in Congress assembled effectually to provide for the exigencies of the Union."

That appointments of Commissioners have also been made by the States of New Hampshire, Massachusetts, Rhode Island, and North Carolina, none of whom however have attended; but that no information has been received by your Commissioners, of any appointment having been made by the States of Connecticut, Maryland, South Carolina, or Georgia.

That the express terms of the powers to your Commissioners supposing a deputation from all the States, and having for object the Trade and Commerce of the United States, Your Commissioners did not conceive it advisable to proceed on the business of their mission, under the Circumstance of so partial and defective a representation.

Deeply impressed however with the magnitude and importance of the object confided to them on this occasion, your Commissioners cannot forbear to indulge an expression of their earnest and unanimous wish, that speedy measures may be taken, to effect a general meeting, of the States, in a future Convention, for the same, and such other purposes, as the situation of public affairs, may be found to require.

If, in expressing this wish, or in intimating any other sentiment, your Commissioners should seem to exceed the strict bounds of their appointment, they entertain a full confidence, that a conduct, dictated by an anxiety for the welfare, of the United States, will not fail to receive an indulgent construction.

In this persuasion, your Commissioners submit an opinion, that the Idea of extending the powers of their Deputies, to other objects, than those of Commerce, which has been adopted by the State of New Jersey, was an improvement on the original plan, and will deserve to be incorporated into that of a future Convention. They are the more naturally led to this conclusion, as in the course of their reflections on the subject, they have been induced to think, that the power of regulating trade is of such comprehensive extent, and will enter so far into the general System of the federal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the Federal System.



That there are important defects in the system of the Federal Government is acknowledged by the Acts of all those States, which have concurred in the present Meeting; That the defects, upon a closer examination, may be found greater and more numerous, than even these acts imply, is at least so far probable, from the embarrassments which characterize the present State of our national affairs, foreign and domestic, as may reasonably be supposed to merit a deliberate and candid discussion, in some mode, which will unite the Sentiments and Councils of all the States. In the choice of the mode, your Commissioners are of opinion, that a Convention of Deputies from the different States, for the special and sole purpose of entering into this investigation, and digesting a plan for supplying such defects as may be discovered to exist, will be entitled to a preference from considerations, which will occur, without being particularised.

Your Commissioners decline an enumeration of those national circumstances on which their opinion respecting the propriety of a future Convention; with more enlarged powers, is founded; as it would be a useless intrusion of facts and observations, most of which have been frequently the subject of public discussion, and none of which can have escaped the penetration of those to whom they would in this instance be addressed. They are however of a nature so serious, as, in the view of your Commissioners to render the situation of the United States delicate and critical, calling for an exertion of the united virtue and wisdom of all the members of the Confederacy.

Under this impression, Your Commissioners, with the most respectful deference, beg leave to suggest their unanimous conviction, that it may essentially tend to advance the interests of the union, if the States, by whom they have been respectively delegated, would themselves concur, and use their endeavours to procure the concurrence of the other States, in the appointment of Commissioners, to meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union; and to report such an Act for that purpose to the United States in Congress assembled, as when agreed to, by them, and afterwards confirmed by the Legislatures of every State, will effectually provide for the same.

Though your Commissioners could not with propriety address these observations and sentiments to any but the States they have the honor to Represent, they have nevertheless concluded from

motives of respect, to transmit Copies of this Report to the United States in Congress assembled, and to the executives of the other States.

By order of the Commissioners

Dated at Annapolis  
September 14th, 1786

### b. Call by Congress

[*Debates in the Federal Convention of 1787 reported by James Madison* (Hunt & Scott ed., published by Carnegie Endowment for International Peace), pp. liv-lv.]

Whereas there is provision, in the Articles of Confederation & Perpetual Union for making alterations therein by the assent of a Congress of the United States and of the legislatures of the several states; And whereas experience hath evinced that there are defects in the present Confederation, as a mean to remedy which several of the States and particularly the State of New York by express instructions to their delegates in Congress have suggested a convention for the purposes expressed in the following resolution and such convention appearing to be the most probable means of establishing in these states a firm national government

*Resolved* that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.

[Adopted Feb. 21, 1787.]

## 8. PLANS FOR A CONSTITUTION

When the Constitutional Convention met, the Virginia delegation, under the leadership of Madison, had prepared a fairly comprehensive set of principles as a basis for a new constitution. This Virginia Plan, as it was called, was presented to the Convention by Governor Randolph on May 29. Representing the views of the large-state group and of those who favored a stronger central government, this plan aroused the opposition of the more ardent advocates of states' rights. Their ideas were consequently formulated and presented to the Convention by Paterson of New Jersey on June 15 these proposals being commonly known as the New Jersey Plan. Other

systematic plans were also presented, notably by Alexander Hamilton and Charles Pinckney, but those of Randolph and Paterson formed the principal basis for discussion.

### a. Virginia Plan

[*Journal of the Constitutional Convention of 1787* (ed. 1819), pp. 67-70.]

## RESOLUTIONS

### OFFERED BY MR. EDMUND RANDOLPH TO THE CONVENTION, MAY 29, 1787

1. *Resolved*, That the articles of the confederation ought to be so corrected and enlarged, as to accomplish the objects proposed by their institution, namely, common defence, security of liberty, and general welfare.

2. *Resolved*, therefore, That the right of suffrage, in the national legislature, ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other may seem best, in different cases.

3. *Resolved*, That the national legislature ought to consist of two branches.

4. *Resolved*, That the members of the first branch of the national legislature ought to be elected by the people of the several states, every \_\_\_\_\_ for the term of \_\_\_\_\_ to be of the age of \_\_\_\_\_ years at least; to receive liberal stipends, by which they may be compensated for the devotion of their time to publick service; to be ineligible to any office established by a particular state, or under the authority of the United States (except those peculiarly belonging to the functions of the first branch) during the term of service and for the space of \_\_\_\_\_ after the expiration of their term of service; and to be subject to recal.

5. *Resolved*, That the members of the second branch of the national legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual legislatures; to be of the age of \_\_\_\_\_ years, at least; to hold their offices for a term sufficient to ensure their independency; to receive liberal stipends, by which they may be compensated for the devotion of their time to the publick service; and to be ineligible to any office established by a particular state, or under the authority of the United States, (except those peculiarly belonging to the functions of the second branch) during the term

of service; and for the space of  
expiration thereof.

after the ex-

6. *Resolved*, That each branch ought to possess the right of originating acts; that the national legislature ought to be empowered to enjoy the legislative right vested in Congress, by the confederation; and moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several states, contravening, in the opinion of the national legislature, the articles of union, or any treaty subsisting under the authority of the union; and to call forth the force of the union against any member of the union failing to fulfil its duty under the articles thereof.

7. *Resolved*, That a national executive be instituted, to be chosen by the national legislature for the term of years, to receive punctually, at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made, so as to affect the magistracy existing at the time of the increase or diminution; to be ineligible a second time; and that, besides a general authority to execute the national laws, it ought to enjoy the executive rights vested in Congress by the confederation.

8. *Resolved*, That the executive, and a convenient number of the national judiciary, ought to compose a council of revision, with authority to examine every act of the national legislature, before it shall operate, and every act of a particular legislature before a negative thereon shall be final; and that the dissent of the said council shall amount to a rejection, unless the act of the national legislature be again passed, or that of a particular legislature be again negated by of the members of each branch.

9. *Resolved*, That a national judiciary be established to hold their offices during good behaviour, and to receive punctually, at stated times, fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution—That the jurisdiction of the inferior tribunals, shall be, to hear and determine, in the first instance, and of the supreme tribunal to hear and determine, in the dernier resort, all piracies and felonies on the high seas; captures from an enemy; cases in which foreigners, or citizens of other states, applying to such jurisdictions, may be interested, or which re-

spect the collection of the national revenue; impeachments of any national officer; and questions which involve the national peace or harmony.

10. *Resolved*, That provision ought to be made for the admission of states, lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the national legislature less than the whole.

11. *Resolved*, That a republican government, and the territory of each state (except in the instance of a voluntary junction of government and territory) ought to be guarantied by the United States to each state.

12. *Resolved*, That provision ought to be made for the continuance of a Congress, and their authorities and privileges, until a given day, after the reform of the articles of union shall be adopted, and for the completion of all their engagements.

13. *Resolved*, That provision ought to be made for the amendment of the articles of union, whensoever it shall seem necessary; and that the assent of the national legislature ought not to be required thereto.

14. *Resolved*, That the legislative, executive, and judiciary powers within the several states ought to be bound by oath to support the articles of union.

15. *Resolved*, That the amendments, which shall be offered to the confederation by the convention, ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon.

#### b. New Jersey Plan

[*Journal of the Constitutional Convention of 1787* (ed. 1819), pp. 123-127.]

#### PROPOSITIONS

#### OFFERED TO THE CONVENTION BY THE HONOURABLE MR. PATTERSON, JUNE 15, 1787

1. *Resolved*, That the articles of confederation ought to be so revised, corrected, and enlarged, as to render the federal constitution adequate to the exigencies of government, and the preservation of the union.

2. *Resolved*, That in addition to the powers vested in the United States in Congress, by the present existing articles of confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods and merchandize of foreign growth or manufacture, imported into any part of the United States—by stamps on paper, vellum, or parchment, and by a postage on all letters and packages passing through the general post office—to be applied to such federal purposes as they shall deem proper and expedient; to make rules and regulations for the collection thereof; and the same from time to time to alter and amend, in such manner as they shall think proper. To pass acts for the regulation of trade and commerce, as well with foreign nations as with each other; provided, that all punishments, fines, forfeitures, and penalties, to be incurred for contravening such rules and regulations, shall be adjudged by the common law judiciary of the states in which any offence contrary to the true intent and meaning of such rules and regulations shall be committed or perpetrated with liberty of commencing, in the first instance, all suits or prosecutions for that purpose, in the superior common law judiciary of such state; subject, nevertheless, to an appeal for the correction of all errors, both in law and fact, in rendering judgment, to the judiciary of the United States.

3. *Resolved*, That whenever requisitions shall be necessary, instead of the present rule, the United States in Congress be authorized to make such requisitions in proportion to the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes; that if such requisitions be not complied with in the time to be specified therein, to direct the collection thereof in the non-complying states; and for that purpose to devise and pass acts directing and authorizing the same; provided, that none of the powers hereby vested in the United States in Congress, shall be exercised without the consent of at least states; and in that proportion, if the number of confederated states should be hereafter increased or diminished.

4. *Resolved*, That the United States in Congress be authorized to elect a federal executive to consist of persons, to continue in office for the term of years; to receive punctually, at stated times, a fixed compensation for the services by them rendered, in which no increase or diminution shall be made, so as

to affect the persons composing the executive at the time of such increase or diminution; to be paid out of the federal treasury; to be incapable of holding any other office or appointment during their time of service, and for \_\_\_\_\_ years thereafter; to be ineligible a second time, and removable on impeachment and conviction for malpractices or neglect of duty, by Congress, on application by a majority of the executives of the several states. That the executive, besides a general authority to execute the federal acts, ought to appoint all federal officers not otherwise provided for, and to direct all military operations; provided, that none of the persons composing the federal executive shall, on any occasion, take command of any troops, so as personally to conduct any military enterprise as general or in any other capacity.

5. *Resolved*, That a federal judiciary be established, to consist of a supreme tribunal, the judges of which to be appointed by the executive, and to hold their offices during good behaviour; to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution. That the judiciary, so established, shall have authority to hear and determine, in the first instance, on all impeachments of federal officers; and by way of appeal, in the dernier resort, in all cases touching the rights and privileges of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any act or ordinance of Congress for the regulation of trade, or the collection of the federal revenue. That none of the judiciary officers shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during their term of service, or for thereafter.

6. *Resolved*, That the legislative, executive, and judiciary powers within the several states, ought to be bound, by oath, to support the articles of union.

7. *Resolved*, That all acts of the United States in Congress assembled, made by virtue and in pursuance of the powers hereby vested in them, and by the articles of the confederation, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, as far as those acts or treaties shall relate to the said states, or their citizens; and that the judiciaries of the several states shall be bound



thereby in their decisions, any thing in the respective laws of the individual states to the contrary notwithstanding.

And if any state, or any body of men in any state, shall oppose or prevent the carrying into execution such acts or treaties, the federal executive shall be authorised to call forth the powers of the confederated states, or so much thereof as may be necessary, to enforce and compel an obedience to such acts, or an observance of such treaties.

8. *Resolved*, That provision ought to be made for the admission of new states into the union.

9. *Resolved*, That provision ought to be made for hearing and deciding upon all disputes arising between the United States and an individual state, respecting territory.

10. *Resolved*, That the rule for naturalization ought to be the same in every state.

11. *Resolved*, That a citizen of one state, committing an offence in another state, shall be deemed guilty of the same offence as if it had been committed by a citizen of the state in which the offence was committed.

## 9. RATIFICATION OF THE CONSTITUTION

The new proposed Constitution was ratified in several states very quickly and without opposition. It was opposed very bitterly, however, in a number of states, including the important ones of Massachusetts, Virginia, and New York. The opposition was for the most part allayed by the understanding that amendments embodying a bill of rights would be promptly submitted and added to the original Constitution. In some states this was made a separate recommendation; in others, as in Massachusetts, it was made a part of the act of ratification.

### a. Massachusetts Act of Ratification

[*Elliot's Debates*, vol. II, pp. 176-178.]

## COMMONWEALTH OF MASSACHUSETTS

*In Convention of the Delegates of the People of the Commonwealth of Massachusetts, 1788*

The Convention, having impartially discussed and fully considered the Constitution for the United States of America, reported to Congress by the Convention of delegates from the United States of America, and submitted to us by a resolution of the General Court of the said commonwealth, passed the twenty-



fifth day of October last past; and acknowledging, with grateful hearts, the goodness of the Supreme Ruler of the universe in affording the people of the United States, in the course of his providence, an opportunity, deliberately and peaceably, without fraud or surprise, of entering into an explicit and solemn compact with each other, by assenting to and ratifying a new Constitution, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity, DO, in the name and in behalf of the people of the commonwealth of Massachusetts, assent to and ratify the said Constitution for the United States of America.

And, as it is the opinion of this Convention, that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of the commonwealth, and more effectually guard against an undue administration of the federal government, the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution:

*First.* That it be explicitly declared, that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised.

*Secondly.* That there shall be one representative to every thirty thousand persons, according to the census mentioned in the Constitution, until the whole number of representatives amount to two hundred.

*Thirdly.* That Congress do not exercise the powers vested in them by the 4th section of the 1st article, but in cases where a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress, agreeably to the Constitution.

*Fourthly.* That Congress do not lay direct taxes, but when the moneys arising from the impost and excise are insufficient for the public exigencies, nor then, until Congress shall have first made a requisition upon the states, to assess, levy, and pay their respective proportion of such requisitions, agreeably to the census fixed in the said Constitution, in such way and manner as the legislatures of the states shall think best, and, in such case, if any state shall neglect or refuse to pay its proportion, pursuant to such requisition, then Congress may assess and levy such state's proportion, together with interest thereon, at the rate of six per

cent. per annum, from the time of payment prescribed in such requisitions.

*Fifthly.* That Congress erect no company with exclusive advantages of commerce.

*Sixthly.* That no person shall be tried for any crime, by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces.

*Seventhly.* The Supreme Judicial Federal Court shall have no jurisdiction of causes between citizens of different states, unless the matter in dispute, whether it concern the realty or personalty, be of the value of three thousand dollars at the least; nor shall the federal judicial powers extend to any action between citizens of different states, where the matter in dispute, whether it concern the realty or personalty, is not of the value of fifteen hundred dollars at the least.

*Eighthly.* In civil actions between citizens of different states, every issue of fact, arising in actions at common law, shall be tried by a jury, if the parties, or either of them, request it.

*Ninthly.* Congress shall at no time consent that any person holding an office of trust or profit, under the United States, shall accept of a title of nobility, or any other title or office, from any king, prince, or foreign state.

And the Convention do, in the name and in the behalf of the people of this commonwealth, enjoin it upon their representatives in Congress, at all times, until the alterations and provisions aforesaid have been considered, agreeably to the 5th article of the said Constitution, to exert all their influence, and use all reasonable and legal methods, to obtain a ratification of the said alterations and provisions, in such manner as is provided in the said article.

And, that the United States, in Congress assembled, may have due notice of the assent and ratification of the said Constitution by this Convention, it is

*Resolved,* That the assent and ratification aforesaid be engrossed on parchment, together with the recommendation and injunction aforesaid, and with this resolution; and that his excellency, JOHN HANCOCK, President, and the Hon. WILLIAM CUSHING, Esq., Vice-President of this Convention, transmit the same, countersigned by the Secretary of the Convention, under their hands and seals, to the United States in Congress assembled.

## b. New York Circular Letter

[*Elliot's Debates*, vol. II, pp. 413-414.]

## THE CIRCULAR LETTER,

*from the Convention of the State of New York to the governors  
of the several states in the Union*

Poughkeepsie, July 28, 1788

SIR:

We, the members of the Convention of this state, have deliberately and maturely considered the Constitution proposed for the United States. Several articles in it appear so exceptionable to a majority of us, that nothing but the fullest confidence of obtaining a revision of them by a general convention, and an invincible reluctance to separating from our sister states, could have prevailed upon a sufficient number to ratify it, without stipulating for previous amendments. We all unite in opinion, that such a revision will be necessary to recommend it to the approbation and support of a numerous body of our constituents.

We observe that amendments have been proposed, and are anxiously desired, by several of the states, as well as by this; and we think it of great importance that effectual measures be immediately taken for calling a convention, to meet at a period not far remote; for we are convinced that the apprehensions and discontents, which those articles occasion, cannot be removed or allayed, unless an act to provide for it be among the first that shall be passed by the new Congress.

As it is essential that an application for the purpose should be made to them by two thirds of the states, we earnestly exhort and request the legislature of your state to take the earliest opportunity of making it. We are persuaded that a similar one will be made by our legislature, at their next session; and we ardently wish and desire that the other states may concur in adopting and promoting the measure.

It cannot be necessary to observe, that no government, however constructed, can operate well, unless it possesses the confidence and good-will of the body of the people; and as we desire nothing more than that the amendments proposed by this or other states be submitted to the consideration and decision of a general convention, we flatter ourselves that motives of mutual affection and conciliation will conspire with the obvious dictates of sound policy to induce even such of the states as may be content with

every article in the Constitution to gratify the reasonable desires of that numerous class of American citizens who are anxious to obtain amendments of some of them.

Our amendments will manifest that none of them originated in local views, as they are such as, if acceded to, must equally affect every state in the Union. Our attachment to our sister states, and the confidence we repose in them, cannot be more forcibly demonstrated than by acceding to a government which many of us think very imperfect, and devolving the power of determining whether that government shall be rendered perpetual in its present form, or altered agreeably to our wishes, and a minority of the states with whom we unite.

We request the favor of your excellency to lay this letter before the legislature of your state; and we are persuaded that your regard for our national harmony and good government will induce you to promote a measure which we are unanimous in thinking very conducive to those interesting objects.

We have the honor to be, with the highest respect, your excellency's most obedient servants.

By the unanimous order of the Convention,

GEORGE CLINTON,  
*President.*

## 10. POPULAR CONTROL OF AMENDING PROCESS

In the amending article of the Constitution, there is no provision for direct popular participation. Several states have, however, adopted the initiative and referendum as means of popular control over actions of the legislatures. In Ohio, which had adopted such initiative and referendum provisions in 1912, the referendum was in 1918 extended specifically to action of the legislature with respect to the ratification of federal amendments. Under this provision of the Ohio constitution, a referendum was sought on the ratification by the legislature of that state of the 18th, and later of the 19th Amendment. The supreme court of the state upheld the right to such referendum, but was on appeal reversed by the United States Supreme Court. Another method of attempting popular control is indicated by the situation in Tennessee.

### a. Referendum in Ohio

[*Hawke v. Smith* (1920), 253 U. S. 221, 227-231; 64 L. Ed. 871, 875-877.]

Mr. Justice Day delivered the opinion of the court: . . .

The 5th article is a grant of authority by the people to Congress. The determination of the method of ratification is the

exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods: by action of the legislatures of three fourths of the states, or conventions in a like number of states. *Dodge v. Woolsey*, 18 How. 331, 348, 15 L. ed. 401, 407. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

All of the amendments to the Constitution have been submitted with a requirement for legislative ratification; by this method all of them have been adopted.

The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by "legislatures?" That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning. . . .

There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the states. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the House of Representatives were required to be chosen by the people of the several states. Article 1, § 2. . . .

The argument to support the power of the state to require the approval by the people of the state of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the states through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this,—ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.

At an early day this court settled that the submission of a constitutional amendment did not require the action of the

President. The question arose over the adoption of the 11th Amendment. *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. ed. 644. In that case it was contended that the amendment had not been proposed in the manner provided in the Constitution, as an inspection of the original roll showed that it had never been submitted to the President for his approval, in accordance with Article 1, § 7, of the Constitution. The Attorney General answered that the case of amendments is a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of the Constitution investing the President with a qualified negative on the acts and resolutions of Congress. In a footnote to this argument of the Attorney General, Justice Chase said: "There can surely be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the Constitution." The court by a unanimous judgment held that the amendment was constitutionally adopted:

It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the state derives its authority from the Federal Constitution to which the state and its people have alike assented.

This view of the amendment is confirmed in the history of its adoption found in 2 Watson on the Constitution, 1301 et seq. Any other view might lead to endless confusion in the manner of ratification of Federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several states. . . .

It follows that the court erred in holding that the state had authority to require the submission of the ratification to a referendum under the state Constitution, and its judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

## b. Popular Control in Tennessee

[Opinion of Acting Attorney General Frierson, in *N. Y. Times*, June 25, 1920.]

The White House, June 24, 1920.

My Dear Mr. Frierson: A constitutional question has arisen in Tennessee with regard to the power of the Legislature to act at once upon the pending suffrage amendment to the Constitution of the United States. A member of the Tennessee Congressional delegation has requested the view of the Federal authorities on that question and I would be very much obliged if you would look into the matter for me and let me have the view of the department, which I will be glad to communicate to the member of Congress who has made the inquiry.

Sincerely yours,

WOODROW WILSON.

Washington, June 24, 1920.

The President,  
The White House.

Dear Mr. President: I have the honor to acknowledge receipt of your note requesting my views as to the power of the present Legislature of Tennessee, if called in extra session, to ratify the proposed suffrage amendment. I have recently discussed this question in some personal correspondence with the Attorney General of Tennessee, and hence am prepared to answer your inquiry promptly.

The Constitution of Tennessee contains a provision to the effect that no Legislature shall act on an amendment to the Federal Constitution unless elected after the proposal of the amendment. The present Tennessee Legislature was elected before the suffrage amendment was proposed.

The ruling of the Supreme Court, however, in the recent Ohio cases, and the consideration which I gave to this question in preparing those cases for hearing, leave no doubt in my mind that the power of a Legislature to ratify an amendment to the Federal Constitution is derived solely from the people of the United States through the Federal Constitution, and not from either the people or the Constitution of a State. The power thus derived cannot be taken away, limited or restricted in any way by the Constitution of a State. The provision of the Tennessee Constitution above referred to, if valid, would undoubtedly be a restriction upon that power. If the people of a

State, through their Constitution, can delay action on an amendment until after one election, there is no reason why they cannot delay it until after two elections, or five elections, or until the lapse of any period of time they may see fit, and thus practically nullify the article of the Federal Constitution providing for amendments. I am, therefore, confident that if the Tennessee Legislature is called in session it will have the clear power to ratify the amendment, notwithstanding any provision of the Tennessee Constitution.

Respectfully,

WILLIAM L. FRIERSON,  
Acting Attorney General.

## 11. PROPOSALS FOR MODIFICATION OF AMENDING PROCESS

The method provided for amending the federal Constitution has usually been thought of as involving serious difficulty, and hence proposals have been made from time to time to liberalize the process and make amendments easier of adoption. However, in view of the adoption of the four latest amendments within a comparatively short time, and also in view of the character of those amendments, some groups have favored further limitations on the process. Especially has there been of recent years considerable feeling that there should be provision for more direct popular participation, or at least of popular control. These various ideas are embodied in the proposal of Senator LaFollette, made as early as 1912 and renewed on several occasions since; and in the so-called Wadsworth-Garrett proposal, introduced into the Senate and House by those men, respectively, in 1923, and favorably reported, but not yet (1928) adopted.

### a. LaFollette Proposal

[*Congressional Record*, vol. 48, pt. 10, p. 19077.]

The Congress, whenever a majority of both Houses shall deem it necessary, or on application of 10 States by resolution adopted in each by the legislature thereof, or by a majority of the electors voting thereon, shall propose amendments to this Constitution to be submitted in each of the several States to the electors qualified to vote for the election of Representatives, and the vote shall be taken at the next ensuing election of Representatives in such manner as the Congress prescribes, and if in a majority of the States a majority of the electors voting also approve the proposed amendments, they shall be valid to all intents and purposes as part of this Constitution.



## b. Wadsworth-Garrett Proposal

[Reported with amendments by Senate Committee on the Judiciary, Mar. 19, 1924; amended and agreed to by the Senate, Mar. 25, 1924; recommitted to the Committee, Mar. 26, 1924. Text in *Congressional Record*, vol. 65, pt. 5, pp. 4493, 4940-4941.]

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution or, upon the application of two-thirds of the legislatures of the several States, shall call a convention for proposing amendments, which, in either case, shall be submitted to the legislatures of the several States, and shall be valid to all intents and purposes, as a part of this Constitution, when ratified by a vote of the qualified electors in three-fourths of the several States after affirmative or negative action by the respective legislatures, said election to be held under such rules and regulations as each State shall prescribe, and that until three-fourths of the States shall have ratified, or more than one-fourth of the States shall have rejected, a proposed amendment, any State may in like manner change its vote: *Provided*, That if at any time more than one-fourth of the States have rejected the proposed amendment, said rejection shall be final, and further consideration thereof by the States shall cease: *Provided further*, That any amendment proposed hereunder shall be inoperative unless it shall have been ratified as an amendment to the Constitution, as provided in the Constitution, within eight years from the date of submission thereof to the States by the Congress: *Provided further*, That no State, without its consent, shall be deprived of its equal suffrage in the Senate.

## CHAPTER III

### CONSTITUTIONAL PRINCIPLES

#### 12. REPUBLICAN GOVERNMENT

Among the constitutional guaranties to the states is that of a republican form of government. The exact meaning of that term has, however, never been made clear; but it was probably best defined by Madison, writing in defense of the Constitution during the campaign for its ratification. The courts have since, in several cases, held that certain political practices, such as the denial of suffrage to women or the use of the initiative and referendum, are not a denial of republican government, but have consistently declined to define the term more positively.

The question as to the meaning of the guaranty, and how it might be made effective, came to the Supreme Court as a result of "Dorr's Rebellion" in Rhode Island. That state had made no new constitution upon the declaration of independence, but continued to be governed under its colonial charter. The demand for a new state constitution became so strong, however, that in 1841 a convention was held, a new constitution was framed, submitted, and ratified by the people, and new state officers elected (with Thomas W. Dorr as governor)—but all without the authority of the existing charter government. There were thus two state governments in Rhode Island, each claiming to be the rightful authority. Dorr attempted to seize control by force, but his armed followers were dispersed and the "rebellion" suppressed. Later, in 1842, another constitutional convention was held under the authority of the charter government, and the instrument framed by it was likewise ratified by the people and became effective in 1843. Meanwhile, the turmoil of 1841-1842 resulted in actions being brought in the courts, and the effort to secure a judicial determination of the republican government guaranty was pressed before the Supreme Court.

#### a. Definition of Republican Government

[James Madison, in *The Federalist*, no. 39.]

What, then, are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers to the constitutions of different States, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute

power over the great body of the people is exercised, in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The government of England, which has one republican branch only, combined with an hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed on the list of republics. These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions.

If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic. It is *sufficient* for such a government that the persons administering it be appointed either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character.

### b. Application of Federal Guaranty

[*Luther v. Borden* (1849), 7 Howard 1, 42-44; 12 L. Ed. 581, 599-600.]

Mr. Chief Justice Taney delivered the opinion of the court: . . . The Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department. . . .

Under this article of the Constitution [Art. IV, Sec. 4] it rests with Congress to decide what government is the established one

in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

So, too, as relates to the clause in the above mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when a contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the Act of February 28, 1795, provided, that, "in case of an insurrection in any State against the government thereof it shall be lawful for the President of the United States, on application of the Legislature of such State or of the executive (when the Legislature cannot be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act under the application of the Legislature or of the executive, and consequently he must determine what body of men constitute the Legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is

unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government call witnesses before it, and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government, which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful.

It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority if it should be found necessary for the general government to interfere; and it is admitted in the argument, that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government; or in treating as wrong-doers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of Congress to the sovereign States of the Union.

### 13. FEDERAL SUPREMACY

A federal system of government, such as that in the United States, presupposes a division of powers between states and nation, each supreme within its own field. The doctrine of federal or national supremacy is also definitely incorporated into the system in the so-called "supreme law of the land clause," but the full meaning and effect of this doctrine upon the power of the states was not at first understood. The right of the states to interpret federal laws for themselves had been asserted on several occasions, notably in the Virginia and Kentucky Resolutions of 1799 and 1800. When this led to an attempt at actual nullification by South Carolina in 1832, President Jackson vigorously asserted and enforced the supremacy of the federal government. The classic judicial exposition of this doctrine of federal supremacy was, however, made by the Supreme Court in 1859, and it may be of some significance that the opinion was written by Chief Justice Taney, a staunch believer in the rights of the states.

[*Ableman v. Booth* (1859), 21 Howard 506, 514-526; 16 L. Ed. 169, 172-176.]

It will be seen, from the foregoing statement of facts, that a judge of the supreme court of the state of Wisconsin, in the first of these cases, claimed and exercised the right to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner, who had been committed by the commissioner for an offense against the laws of the government, and that this exercise of power by the judge was afterwards sanctioned and affirmed by the supreme court of the state.

In the second case the state court has gone a step farther, and claimed and exercised jurisdiction over the proceedings and judgment of a district court of the United States, and upon a summary and collateral proceeding, by habeas corpus, has set aside and annulled its judgment, and discharged a prisoner, who had been tried and found guilty of an offense against the laws of the United States, and sentenced to imprisonment by the district court.

And it further appears that the state court have not only claimed and exercised this jurisdiction, but have also determined that their decision is final and conclusive upon all the courts of the United States, and ordered their clerk to disregard and refuse obedience to the writ of error issued by this court, pursuant to the act of Congress of 1789, to bring here for examination and revision the judgment of the state court.

These propositions are new in the jurisprudence of the United States as well as of the states; and the supremacy of the state courts over the courts of the United States, in cases arising under

the Constitution and laws of the United States, is now for the first time asserted and acted upon in the supreme court of a state.

The supremacy is not, indeed, set forth distinctly and broadly, in so many words, in the printed opinions of the judges. It is intermixed with elaborate discussions of different provisions in the fugitive slave law, and of the privileges and power of the writ of habeas corpus. But the paramount power of the state court lies at the foundation of these decisions; for their commentaries upon the provisions of that law, and upon the privileges and power of the writ of habeas corpus, were out of place, and their judicial action upon them without authority of law, unless they had the power to revise and control the proceedings in the criminal case of which they were speaking; and their judgments, releasing the prisoner, and disregarding the writ of error from this court, can rest upon no other foundation.

If the judicial power exercised in this instance has been reserved to the states, no offense against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the state in which the party happens to be imprisoned; for, if the supreme court of Wisconsin possessed the power it has exercised in relation to offenses against the act of Congress in question, it necessarily follows that they must have the same judicial authority in relation to any other law of the United States; and, consequently, their supervising and controlling power would embrace the whole Criminal Code of the United States, and extend to offenses against our revenue laws, or any other law intended to guard the different departments of the general government from fraud or violence. And it would embrace all crimes, from the highest to the lowest; including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And, moreover, if the power is possessed by the supreme court of the state of Wisconsin, it must belong equally to every other state in the Union, when the prisoner is within its territorial limits; and it is very certain that the state courts would not always agree in opinion; and it would often happen, that an act which was admitted to be an offense, and justly punished, in one state, would be regarded as innocent, and indeed as praiseworthy, in another.

It would seem to be hardly necessary to do more than to state the result to which these decisions of the state courts must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and

preserving the union of the states, could have lasted a single year, or fulfilled the high trusts committed to it, if offenses against its laws could not have been punished without the consent of the state in which the culprit was found.

The judges of the supreme court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty, and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so; for no state can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government. And although the state of Wisconsin is sovereign within its territorial limits to certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the general government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye. And the state of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the state in which he was imprisoned. . . .

Questions of this kind must always depend upon the Constitution and laws of the United States, and not of a state. The Constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the states then possessed should be ceded to the general government; and that, in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without



interruption from a state or from state authorities. And it was evident that anything short of this would be inadequate to the main objects for which the government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one state upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals. . . .

But the supremacy thus conferred on this government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice in the several states, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken. And the Constitution and laws and treaties of the United States, and the powers granted to the Federal government, would soon receive different interpretations in different states, and the government of the United States would soon become one thing in one state and another thing in another. It was essential, therefore, to its very existence as a government, that it should have the power of establishing courts of justice, altogether independent of state power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a state court or a court of the United States, should be finally and conclusively decided. Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy (which is but another name for independence), so carefully provided in the clause of the Constitution above referred to, could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority. . . .

Nor is there anything in this supremacy of the general government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural and just pride of state sovereignty. Neither this government, nor the powers of which we are speaking, were forced upon the states. The Constitution of the United States, with all the powers conferred by it on the general government, and surrendered by the state, was the volun-

tary act of the people of the several states, deliberately done, for their own protection and safety against injustice from one another. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a state, is proved by the clause which requires that the members of the state legislatures, and all executive and judicial officers of the several states (as well as those of the general government), shall be bound, by oath or affirmation, to support this Constitution. This is the last and closing clause of the Constitution, and inserted when the whole frame of government, with the powers hereinbefore specified, had been adopted by the convention; and it was in that form, and with these powers, that the Constitution was submitted to the people of the several states, for their consideration and decision.

Now, it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign state, to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a state of this Union. On the contrary the highest honor of sovereignty is untarnished faith. And certainly no faith could be more deliberately and solemnly pledged than that which every state has plighted to the other states to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes. In the emphatic language of the pledge required, it is to support this Constitution. And no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a state court, where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the state.

#### 14. IMPLIED POWERS

The constitutional principle that the federal government and its organs have only delegated powers was always well understood. The so-called "necessary and proper" or "elastic clause", however, evoked considerable discussion as to the extent to which powers other than those expressly enumerated might be exercised by these federal organs. Hamilton became

the leader of those who insisted on a liberal interpretation of that clause, and who were therefore called the "broad" or "loose constructionists". Jefferson and his followers believed, on the other hand, in a strict interpretation of the clause in question, although they did not deny absolutely the existence of implied powers. They were therefore called the "strict" or "narrow constructionists". This division of opinion became evident in connection with several of the governmental policies, but with none more sharply than the creation of a United States Bank. Such a bank was established in 1791, in spite of the bitter opposition of the Jeffersonians, and existed until 1811, when its charter expired. A Second United States Bank was chartered in 1816, and the state of Maryland imposed a heavy tax upon the notes issued by its Baltimore branch. The refusal of the branch bank to pay this tax brought before the Supreme Court the question of the power of the federal government to establish such a bank as well as the state's power to tax federal instrumentalities. The resulting exposition of the doctrine of implied powers is perhaps the most important of Chief Justice Marshall's opinions, since it formed the basis for the notable expansion of federal power and strengthened the Union accordingly.

[*McCulloch v. Maryland* (1819), 4 Wheat. 316, 400, 404-424; 4 L. Ed. 579, 600-606.]

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that Constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty.

The first question made in the cause is, has Congress power to incorporate a bank? . . .

The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. . . .

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people"; thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment, had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the first article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient

means, if, to employ them, it be necessary to erect a corporation.

. . . The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of affecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained, whether Congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? . . . That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the

powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it includes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. . . . This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view. . . .

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion

can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. . . .

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. . . .

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land. . . .

## 15. CONCURRENT POWER

The national and state governments have, for the most part, rather sharply defined fields of power, over which each has exclusive jurisdiction. There are, however, a few matters over which both may exercise jurisdiction. These matters were at first comparatively unimportant and caused no serious difficulty. With the adoption of national prohibition and the incorporation into the 18th Amendment of a specific grant of concurrent power over its enforcement, the meaning and application of the term became of great importance. The Supreme Court has interpreted the provision to mean that the nation and the states may each have their own enforcement laws, but



that the laws of the states may not be of such a character as to weaken or nullify the national act. The provision means, further, that state agencies may be used to enforce the Amendment and national enforcement acts, whether or not the state has any act of its own. Governor Smith, of New York, made this plain in signing the repeal of that state's enforcement act. More recently President Coolidge similarly, by executive order, proposed to bring about a more adequate enforcement of the national act through state agencies, an action that aroused considerable controversy but that was upheld by the Attorney General and by the Senate Judiciary Committee as a proper exercise of power.

#### a. Statement of Governor Smith, June 1, 1923

[*N. Y. Times*, June 2, 1923.]

. . . . .  
In 1921 there was enacted in this state what has come to be known as the Mullan-Gage law. It put into the penal statutes substantially all of the provisions of the Volstead act, but accompanied them by even more rigorous provisions as to search and seizure. . . .

Let me say first what the repeal of the Mullan-Gage law will not do.

Its repeal will not make legal a single act which was illegal during the period of the existence of the statute.

Many communications I have received and arguments that have been made to me, indicate a belief that its repeal will make possible the manufacture, sale and distribution of light wines and beers; so far as that is concerned it will still be under the control it is today, subject to the provisions of the Volstead act.

Repeal of the Mullan-Gage law will not bring back light wines and beer.

The Supreme Court of the United States said: "The constitution, laws and treaties of the United States are as much the part of the law of every state as its own local laws and constitution."

That means that after repeal there will still rest upon the peace officers of this state the sacred responsibility of sustaining the Volstead act with as much force and as much vigor as they would enforce any state law, or local ordinance, and I shall expect the discharge of that duty in the fullest measure by every peace officer in the state.

The only difference after repeal is, that today the police officer may take the offender for prosecution to the state court, to the federal court, or to both. After the repeal of the Mullan-Gage law, the prosecution must be where it belongs—in the federal

court. In law and in fact, there is no more lawlessness in repealing the Mullan-Gage law than there is in the failure of the state to pass statutes making it a state crime to violate any other federal penal statute.

Let it be understood at once and for all, that this repeal does not in the slightest degree lessen the obligation of peace officers of the state to enforce in its strictest letter the Volstead act and warning to that effect is herein contained as coming from the chief executive of the state of New York.

At this point, with all the earnestness that I am able to bring to my command, let me assure the thousands of people who wrote to me on this subject, and the citizens of the state generally, that the repeal of the Mullan-Gage law will not and cannot by any possible stretch of the imagination, bring back into existence the saloon which is and ought to be a defunct institution in this country, and any attempt at its reestablishment by a misconstruction of the executive attitude on this bill will be forcefully and vigorously suppressed.

Let me now say what the repeal of the Mullan-Gage law will do.

Its repeal will do away entirely with the possibility of double jeopardy for violation of the laws enforcing the eighteenth amendment. By that we mean that no citizen shall be twice punished for the one offense. Under the United States Supreme court decision in the Lanza case a citizen is today subjected to double trial and even subjected to double punishment for a single offense because such alleged offense is a violation of both the state and the federal law. This is an unwarranted and indefensible exception to the fundamental constitutional guarantee contained in both the federal and state constitutions that no person shall be twice tried or punished for the same offense. . . .

The repeal of the Mullan-Gage law will mean that violations of the Volstead act will hereafter be prosecuted in the federal courts. This, to my mind, seems to be desirable, as it will fix in the minds of offenders the thought that they have violated a federal statute intended to effectuate an amendment to the constitution of the United States rather than have them harbor the thought that they are simply standing against what a great many of them may be led to believe is merely a local regulation.

The burden imposed on the state to prosecute traffickers in liquor as violators of a state statute is a wasteful and futile one because of the refusal of grand juries to indict and of petit juries to convict.

Let us apply to this question the principles of good business,

good judgment, and common sense. I promised myself that I would not consider the subject solely from the standpoint of constitutional law or political expediency, and I have labored to make my study of it practical. While there will be no letup on the part of the police officials of this state in the enforcement of the Volstead act, I cannot help thinking and saying, as I owe it to the people of this state to say, that the real solution of proper enforcement rests primarily with the federal government.

The practical side of this question, to my way of thinking, indicates that little, if any, of the liquor consumed in this state is manufactured here. It is imported from foreign countries. The federal government is the one agency that can attack the base of supply. It is infinitely easier to stop the smuggling in of 500 cases of liquor before bulk is broken than to trace the same 500 after they find their way into different parts of the state in small quantities.

The division of responsibility for primary execution of the enforcement law, may, in part, explain the failure of federal enforcement officials to stop the smuggling of liquor in bulk into this state, which has certainly raised a serious question, as to the efficiency and in some cases, the earnestness of federal enforcement agencies.

Whenever the ultimate responsibility is divided, there is a tendency for each authority or agency upon whom it rests to rely upon the other. The state in the nature of things cannot guard her frontiers of land and water against this smuggling as well as the federal authorities should be able to do it.

If we place squarely upon the federal authorities the primary duty and obligation to put an end to the enormous smuggling of liquor from foreign countries into this state, it will be where it rightfully belongs and we will have taken a long step forward to the reestablishment of respect for and enforcement of law. . . .

#### **b. Executive Order of President Coolidge, May 8, 1926**

[*Congressional Record*, vol. 67, pt. 9, p. 9923.]

### **EXECUTIVE ORDER**

The Executive Order of January 17, 1873, is hereby amended by the addition of the following paragraph:

In order that they may more efficiently function in the enforcement of the National Prohibition Act, any State, county, or municipal officer may be appointed, at a nominal rate of com-

pensation, as prohibition officer of the Treasury Department to enforce the provisions of the National Prohibition Act and acts supplemental thereto, in States and territories except in those States having constitutional or statutory provisions against State officers holding office under the Federal government.

CALVIN COOLIDGE.

The White House,  
May 8, 1926.

(No. 4439)

## 16. EXTRADITION

There are many problems in interstate relations that arise out of the independent position of the states in the Union, of which one of the most difficult is that relating to the enforcement of law. The Constitution attempts to provide at least a partial remedy for this particular difficulty by requiring the extradition of persons who have fled from one state to another in order to escape the legal processes. This constitutional provision has been supplemented by statutes of Congress, providing the detailed regulations under which extradition is to be carried out. Although both the constitutional and statutory provisions are of a mandatory character, the governors have exercised their discretion and have frequently refused to give up persons demanded in the proper manner. The courts have held that governors cannot be compelled to extradite, hence the result has been to enhance the discretionary powers of the governor, and to make him in effect a judicial officer. The following documents show the manner in which this power is frequently exercised. The first case concerned one Walter Seolow, charged with murder in Maryland; the second was that of one Albert P. Russell, charged with wife desertion in Massachusetts.

### a. Correspondence between Governor Miller of New York and Governor Ritchie of Maryland, 1922

[*N. Y. Times*, Sept. 26, 27, 1922.]

Sept. 25, 1922.

Hon. Albert C. Ritchie,  
Governor of the State of Maryland,  
Annapolis, Md.

My dear Governor:

I issued a warrant on Sept. 19 for the extradition of one Walter Seolow, to your State, where he was wanted on a homicide charge. On that day he was before Supreme Court Justice Martin in Part II of the Supreme Court on a writ of habeas corpus, which had been sued out upon a fugitive warrant issued by a magistrate, upon which he was then held.

Information was conveyed to the court that the Governor's

warrant had been issued, whereupon it was agreed that the fugitive warrant had been superseded by the Governor's warrant and that a new writ would have to be sued out. The Court thereupon directed a dismissal of the pending writ, whereupon, in defiance of the direction of the judge presiding, the prisoner was forcibly rushed from the court room by those in whose custody he was and was taken to your State. The circumstances clearly prove that that was done pursuant to a preconceived plan to prevent a hearing on a writ of habeas corpus.

The rendition of a fugitive from justice upon a proper demand is essential to a proper administration of the criminal law, as well as a matter of comity between the States. It is important that those who commit crimes or who are charged with the commission of crime be promptly apprehended and tried in the jurisdiction where the crime is charged to have been committed, but it is equally important that the law be administered in orderly fashion and that those charged with its execution should themselves respect the law and lawful and orderly procedure.

The right of every person to have the cause of his detention inquired into on a writ of habeas corpus by the courts in the jurisdiction where he is detained is certainly as great as the obligation of the State to surrender a fugitive from justice. The prisoner was entitled to have the question whether he was a fugitive from justice judicially determined on a writ of habeas corpus, but, doubtless due to an excess of zeal, the officers from your State forcibly removed him from the court room where he was actually in the custody of the court, and this was done in defiance of the direction of the court, who would undoubtedly have taken proper provision to enable the relator to secure a new writ and thus to avoid the mere technicality arising from the fact that the original warrant on which he was held had been superseded by a Governor's warrant. As a matter of fact I do not believe it was possible that my warrant could have reached New York at the time of the occurrence, because it was only issued on the 19th.

I am sure that you will agree with me in the foregoing views and will recognize the importance of insisting upon orderly and lawful procedure. Of course, Scolow is now subject to the jurisdiction of your courts, and on the question of their jurisdiction it is not material how he came to your State, even though he may have been kidnapped and unlawfully taken there. But I trust that you will view the question as I do, that this is not a question as to who has technical custody, but is rather a question of whether respect of law is to be maintained by its orderly administration.

Scolow has been denied the right to have the question whether he was a fugitive from justice of your State judicially determined by the courts of this State on a writ of habeas corpus. He was denied that right by disgraceful conduct amounting certainly to a contempt of court, if not to a more serious crime.

The merits of the case sink into insignificance as compared with the importance of maintaining the orderly administration of justice. I therefore request that you cause Scolow to be returned to the State of New York to the end that he may have his Constitutional right to a judicial determination of the validity of his detention.

Very sincerely yours,

NATHAN L. MILLER.

Sept. 26, 1922.

Hon. Nathan L. Miller  
Governor of New York  
Albany, N. Y.

My attention has just been called to your letter to me of Sept. 25, published in the public press, asking that Scolow be returned to New York, and I hasten to reply at once.

It is a matter of extreme regret to me if Scolow's constitutional rights were disregarded by any of our Maryland officials, although the New York authorities themselves do not agree that such was the case, as is evidenced by the statement of District Attorney Banton. Assuming, however, that it was the case, then appropriate discipline for those responsible may be proper, but I cannot see how irregularity in the manner of bringing Scolow to Baltimore can, under the existing circumstances, justify me in now sending him back to New York.

Scolow is actually on trial today in the Criminal Court of Baltimore City, charged with a murder which shocked the entire community. He has committed no crime against the laws of New York, and if returned there now the New York courts must inevitably send him back again, subject to the delays of one or more writs of habeas corpus which would undoubtedly be issued and which could have no possible purpose except unjustifiable delay.

It seems to me, with very great respect, that for me, under the conditions, to undertake to stop the trial now and return Scolow to New York, simply for the purpose of having him ultimately sent back again to Maryland under circumstances which would conform to more orderly legal procedure, would, in the eyes of

the people, tend to lessen confidence in the administration of the criminal law, and would still further impair the respect of the people for the great writ of habeas corpus, once the foundation of our liberties, but now all too often prostituted and abused.

I very much regret not to comply with any request of yours, but in the present instance the reasons I have given seem to me controlling.

ALBERT C. RITCHIE,  
Governor.

b. Letter of Governor Ferguson of Texas to Governor Fuller of  
Massachusetts, Mar. 24, 1925

[*N. Y. Times*, Mar. 25, 1925.]

. . . . .

Permit me to say, that after a study of the facts and the many authorities cited, I am more convinced than ever that my former action in refusing the rendition of Albert P. Russell was based upon both law and justice.

In doing this I do not impugn the good faith of Massachusetts or her officials charged with the administration of her laws. I have only chosen to use my discretion as I am permitted to do under the law. . . .

I have many precedents, either right or wrong, but the most vivid to my memory of them all is the action of a Governor of Massachusetts a short time ago in refusing to honor the requisition of Governor John J. Cornwell of West Virginia for the interstate rendition of a negro charged with a felony in West Virginia, who sought a haven of safety in your State and found it.

The story is that the Governor of West Virginia made many demands upon the Bay State Governor for this negro and the Massachusetts Governor refused to deliver him because, as stated by him, he feared the negro would not receive a fair trial in the State of West Virginia. The negro's name was Johnson.

Assuring you that I shall not, as long as I am Governor, permit the Lone Star State to become a haven of refuge to which criminals might flee, on the one hand, or allow its high office to degrade to the order of a collecting agency, on the other, I beg to remain, sir, respectfully yours,

MIRIAM A. FERGUSON,  
Governor.

## 17. PRIVILEGES AND IMMUNITIES

The Constitution contains two provisions guaranteeing the privileges and immunities of citizenship to citizens of each state and of the United States, but without defining what is meant by such privileges and immunities. The courts have been compelled to decide several cases involving this guaranty, but have not interpreted it in any explicit manner. They have, however, given a general interpretation which was probably best stated in a case involving the rights of corporations in the state of Virginia, decided in 1869.

[*Paul v. Virginia* (1869), 8 Wall. 168, 180-181; 19 L. Ed. 357, 360.]

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. *Lemmon v. People*, 20 N. Y. 607.

Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their Constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given.



## 18. APPLICATION OF THE BILL OF RIGHTS

Again and again the suggestion is made that certain acts of state or local authorities are depriving persons of rights guaranteed to them by the national Constitution, and particularly by that part of the Constitution known as the Bill of Rights. The Supreme Court quite early in our history made clear the actual application of the Bill of Rights as a safeguard of the individual against governmental action. The case arose as the result of action by the city of Baltimore in diverting the flow of certain streams in such manner as to destroy the usefulness of a valuable wharf owned by the firm Craig & Barron. No compensation was given for this destruction of property, and the owners brought suit to recover damages, pleading the Fifth Amendment as requiring such compensation.

[*Barron v. Baltimore* (1833), 7 Peters 243, 247-251; 8 L. Ed. 672, 674-675.]

Mr. Chief Justice Marshall delivered the opinion of the court:

The judgment brought up by this writ of error having been rendered by the court of a State, this tribunal can exercise no jurisdiction over it unless it be shown to come within the provisions of the twenty-fifth section of the Judicial Act.

The plaintiff in error contends that it comes within that clause in the fifth amendment to the Constitution which inhibits the taking of private property for public use without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance but not of much difficulty.

The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in

the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the States. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the Constitution was intended to secure the people of the several States against the undue exercise of power by their respective State governments; as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the tenth section of the first article.

We think that section affords a strong if not a conclusive argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government. Some of them use language applicable only to Congress, others are expressed in general terms. The third clause, for example, declares that "no bill of attainder or ex post facto law shall be passed." No language can be more general; yet the demonstration is complete that it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain State legislation, contains in terms the very prohibition. It declares that "no State shall pass any bill of attainder or ex post facto law." This provision, then, of the ninth section, however comprehensive its language, contains no restriction on State legislation.

The ninth section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the tenth proceeds to enumerate those which were to operate on the State legislatures. These restrictions are brought together in the same section, and are by express words applied to the States. "No State shall enter into any treaty," etc. Perceiving that in a Constitution framed by the people of the United States for the government of all, no limi-

tation of the action of government on the people would apply to the State government unless expressed in terms; the restrictions contained in the tenth section are in direct words so applied to the States.

It is worthy of remark, too, that these inhibitions generally restrain State legislation on subjects intrusted to the general government, or in which the people of all the States feel an interest.

A State is forbidden to enter into any treaty, alliance or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. To grant letters of marque and reprisal would lead directly to war, the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress. It would be tedious to recapitulate the several limitations on the powers of the States which are contained in this section. They will be found, generally, to restrain State legislation on subjects intrusted to the government of the Union, in which the citizens of all the States are interested. In these alone were the whole people concerned. The question of their application to States is not left to construction. It is averred in positive words.

If the original Constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government and on those of the States; if in every inhibition intended to act on State power words are employed which directly express that intent, some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason.

Had the people of the several States, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments, the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented State, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of Congress and the assent of three-fourths of their sister States, could never have occurred to any human being as

a mode of doing that which might be effected by the State itself. Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revoution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.

We are of opinion that the provision in the fifth amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the States. We are therefore of opinion that there is no repugnancy between the several acts of the General Assembly of Maryland, given in evidence by the defendants at the trial of this cause in the court of that State, and the Constitution of the United States.

This court, therefore, has no jurisdiction of the cause, and it is dismissed.

## 19. CONTROL OF SUFFRAGE

The determination of suffrage qualifications is, on the whole, clearly within the jurisdiction of the states, subject only to the limitations imposed by the 14th, 15th and 19th Amendments. In spite of the first two of these Amendments, the several Southern states have sought means to disfranchise the negro. The so-called "grandfather clauses" having been declared unconstitutional by the Supreme Court, other means were devised, of which the most effective was the "white primary." This was thought to be within the Constitution, since the primary was considered a purely state institution not subject to national regulation. The South being a one-party region, it is obvious that if the negro could be prevented from participation in the primary, his participation in the later election would be of no importance. The "white primary" was, however, also declared unconstitutional in 1927. There are still in effect tax requirements and the so-called "reasonable understanding" clauses, the operation of which serve to bar the negro from the polls and also to emphasize the power of the state that remains in spite of the constitutional limitations.

### a. Texas White Primary Case

[*Nixon v. Herndon* (1927), *U. S. Supreme Court Advance Opinions*, Apr. 1, 1927, pp. 507-508.]

Mr. Justice Holmes delivered the opinion of the court:

This is an action against the judges of elections for refusing to permit the plaintiff to vote at a primary election in Texas. It lays the damages at \$5,000. The petition alleges that the plaintiff is a negro, a citizen of the United States and of Texas and a resident of El Paso, and in every way qualified to vote, as set forth in detail, except that the statute to be mentioned interferes with his right; that on July 26, 1924, a primary election was held at El Paso for the nomination of candidates for a senator and representatives in Congress and state and other officers, upon the Democratic ticket; that the plaintiff, being a member of the Democratic party, sought to vote, but was denied the right by defendants; that the denial was based upon a statute of Texas enacted in May, 1923, and designated article 3093a, by the words of which "in no event shall a negro be eligible to participate in a Democratic party primary election held in the state of Texas," etc., and that this statute is contrary to the 14th and 15th Amendments to the Constitution of the United States. The defendants moved to dismiss upon the ground that the subject matter of the suit was political and not within the jurisdiction of the court and that no violation of the Amendments was shown. The suit was dismissed and a writ of error was taken directly to this court. Here no argument was made on

behalf of the defendants but a brief was allowed to be filed by the attorney general of the state. . . .

The important question is whether the statute can be sustained. But although we state it as a question the answer does not seem to us open to a doubt. We find it unnecessary to consider the 15th Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the 14th. That Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them. . . . That Amendment "not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws. . . . What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color?" . . . The statute of Texas, in the teeth of the prohibitions referred to, assumes to forbid negroes to take part in a primary election the importance of which we have indicated, discriminating against them by the distinction of color alone. States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case.

Judgment reversed.

#### b. Suffrage Provisions in Louisiana

[*Louisiana Constitution of 1921*, Art. VIII, Secs. 1-2.]

SECTION 1. After January 1, 1922, the right to vote in Louisiana shall not exist except under the provisions of this constitution.

Every citizen of this state and of the United States, native born or naturalized, not less than 21 years of age, and possessing the following qualifications, shall be an elector, and shall be entitled to vote at any election in the state by the people.

(a) He shall have been an actual bona fide resident of the state for two years, of the parish one year, of the municipality in municipal elections, four months, and of the precinct, in which he offers to vote, three months next preceding the election.

. . .

(b) He shall be at the time he offers to vote, legally enrolled as a registered voter on his own personal application, in accordance with the provisions of this constitution, and the laws enacted thereunder.

(c) He shall be of good character and shall understand the duties and obligations of citizenship under a republican form of government. He shall be able to read and write, and shall demonstrate his ability to do so when he applies for registration by making, under oath, administered by the registration officer or his deputy, written application therefor, in the English language, or his mother tongue, which application shall contain the essential facts necessary to show that he is entitled to register and vote, and shall be entirely written, dated, and signed by him, except that he may date, fill out, and sign the blank application for registration hereinafter provided for, and, in either case, in the presence of the registration officer or his deputy, without assistance or suggestion from any person or any memorandum whatever, other than the form of application hereinafter set forth; provided, however, that if the applicant be unable to write his application in the English language, he shall have the right, if he so demands, to write the same in his mother tongue from the dictation of an interpreter; and, if the applicant is unable to write his application by reason of physical disability, the same shall be written at his dictation by the registration officer or his deputy, upon his oath of such disability. . . .

Said applicant shall also be able to read any clause in this constitution, or the Constitution of the United States, and give a reasonable interpretation thereof.

(d) If he is not able to read and write, then he shall not be entitled to register if [unless] he shall be a person of good character and reputation, attached to the principles of the Constitution of the United States and of the state of Louisiana, and shall be able to understand and give a reasonable interpretation of any section of either constitution when read to him by the registrar, and he must be well disposed to the good order and happiness of the state of Louisiana and of the United States and must understand the duties and obligation of citizenship under a republican form of government. . . .

SECTION 2. No person less than sixty years of age shall be permitted to vote at any election in the state who shall not, in addition to the qualifications above prescribed, have paid on or before the 1st day of December, of each year, for the two years next preceding the year in which he offers to vote, a poll tax of

one dollar per annum, to be used exclusively in aid of the public schools of the parish in which such tax shall have been collected; which tax is hereby imposed on every resident of this state between the age of twenty-one and sixty years. . . .

Every person liable for such tax shall, before being allowed to vote, exhibit to the commissioners of election his poll tax receipts for two years as above prescribed, issued on the official form, or duplicates thereof, in the event of loss; or proof of payment of such poll taxes may be made by certificate of the tax collector, which shall be sent to the commissioners of the several voting precincts, showing a list of those who have paid said two years' poll taxes as above provided, and the dates of payment.

. . .



## CHAPTER IV

### THE PARTY SYSTEM

#### 20. IMPORTANCE OF THE POLITICAL PARTY

There is no provision in the national Constitution for political parties. and apparently the founders of our government felt that parties were not only unnecessary but undesirable. The party system has, nevertheless, become thoroughly established as a political institution, although there may still be differences of opinion as to its usefulness.

##### a. View of Washington

[Farewell Address, Sept. 17, 1796. *Writings of George Washington* (Ford ed., published by G. P. Putnam's Sons), vol. XIII, pp. 297-305.]

. . . . .

To the efficacy and permanency of your Union, a Government for the whole is indispensable.—No alliances however strict between the parts can be an adequate substitute.—They must inevitably experience the infractions and interruptions which all alliances in all times have experienced.—Sensible of this momentous truth, you have improved upon your first essay, by the adoption of a Constitution of Government, better calculated than your former for an intimate Union, and for the efficacious management of your common concerns.—This government, the offspring of our own choice uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support.—Respect for its authority, compliance with its Laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true Liberty.—The basis of our political systems is the right of the people to make and to alter their Constitutions of Government.—But the Constitution which at any time exists, 'till changed by an explicit and authentic act of the whole People, is sacredly obligatory upon all.—The very idea of the power and the right of the People to establish Government,

presupposes the duty of every individual to obey the established Government.

All obstructions to the execution of the Laws, all combinations and associations, under whatever plausible character, with the real design to direct, controul, counteract, or awe the regular deliberation and action of the constituted authorities, are destructive of this fundamental principle, and of fatal tendency.—They serve to organize faction, to give it an artificial and extraordinary force—to put in the place of the delegated will of the Nation, the will of a party;—often a small but artful and enterprising minority of the community;—and, according to the alternate triumphs of different parties, to make the public administration the mirror of the ill-concerted and incongruous projects of faction, rather than the organ of consistent and wholesome plans digested by common councils, and modified by mutual interests.—However combinations or associations of the above description may now and then answer popular ends, they are likely, in the course of time and things, to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the Power of the People and to usurp for themselves the reins of Government; destroying afterwards the very engines, which have lifted them to unjust dominion.—

Towards the preservation of your Government and the permanency of your present happy state, it is requisite, not only that you steadily discountenance irregular oppositions to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles, however specious the pretexts.—One method of assault may be to effect, in the forms of the Constitution, alterations which will impair the energy of the system, and thus to undermine what cannot be directly overthrown.—In all the changes to which you may be invited, remember that time and habit are at least as necessary to fix the true character of Governments, as of other human institutions—that experience is the surest standard, by which to test the real tendency of the existing Constitution of a Country—that facility in changes upon the credit of mere hypothesis and opinion exposes to perpetual change, from the endless variety of hypothesis and opinion:—and remember, especially, that, for the efficient management of your common interests, in a country so extensive as ours, a Government of as much vigor as is consistent with the perfect security of Liberty is indispensable.—Liberty itself will find in such a Government, with powers properly distributed and adjusted, its surest Guardian.—It is, indeed, little else than a

name, where the Government is too feeble to withstand the enterprises of faction, to confine each member of the society within the limits prescribed by the laws, and to maintain all in the secure and tranquil enjoyment of the rights of person and property.

I have already intimated to you the danger of Parties in the State, with particular reference to the founding of them on Geographical discriminations.—Let me now take a more comprehensive view, and warn you in the most solemn manner against the baneful effects of the Spirit of Party, generally.

This Spirit, unfortunately, is inseparable from our nature, having its root in the strongest passions of the human mind.—It exists under different shapes in all Governments, more or less stifled, controuled, or repressed; but, in those of the popular form, it is seen in its greatest rankness, and is truly their worst enemy.—

The alternate domination of one faction over another, sharpened by the spirit of revenge natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism.—But this leads at length to a more formal and permanent despotism.—The disorders and miseries, which result, gradually incline the minds of men to seek security and repose in the absolute power of an Individual: and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation, on the ruins of Public Liberty.

Without looking forward to an extremity of this kind, (which nevertheless ought not to be entirely out of sight), the common and continual mischiefs of the spirit of Party are sufficient to make it the interest and duty of a wise People to discourage and restrain it.—

It serves always to distract the Public Councils, and enfeeble the Public administration.—It agitates the community with ill founded jealousies and false alarms, kindles the animosity of one part against another, foment occasionally riot and insurrection.—It opens the doors to foreign influence and corruption, which find a facilitated access to the Government itself through the channels of party passions. Thus the policy and the will of one country, are subjected to the policy and will of another.

There is an opinion that parties in free countries are useful checks upon the Administration of the Government, and serve to keep alive the Spirit of Liberty.—This within certain limits is probably true—and in Governments of a Monarchical cast,

Patriotism may look with indulgence, if not with favour, upon the spirit of party.—But in those of the popular character, in Governments purely elective, it is a spirit not to be encouraged.—From their natural tendency, it is certain there will always be enough of that spirit for every salutary purpose,—and there being constant danger of excess, the effort ought to be, by force of public opinion, to mitigate and assuage it.—A fire not to be quenched; it demands a uniform vigilance to prevent its bursting into a flame, lest instead of warming, it should consume.

### b. View of Coolidge

[Inaugural Address, Mar. 4, 1925. Text in *N. Y. Times*, Mar. 5, 1925.]

Since its very outset it has been found necessary to conduct our government by means of political parties. That system would not have survived from generation to generation if it had not been fundamentally sound and provided the best instrumentalities for the most complete expression of the popular will.

It is not necessary to claim that it has always worked perfectly. It is enough to know that nothing better has been devised.

No one would deny that there should be full and free expression and an opportunity for independence of action within the party. There is no salvation in a narrow and bigoted partisanship. But if there is to be responsible party government the party label must mean something more than a mere device for securing office.

Unless those who are elected under the same party designation are willing to assume sufficient responsibility and exhibit sufficient loyalty and coherence so that they can cooperate with each other in the support of the broad general principles of the party platform the election is merely a mockery, no decision is made at the polls, and there is no representation of the popular will.

Common honesty and good faith with the people who support a party at the polls require that party when it enters office to assume the control of that portion of the government to which it has been elected. Any other course is bad faith and a violation of the party pledges.

When the country has bestowed its confidence on a party by making it a majority in congress it has a right to expect such unity of action as will make the party majority an effective instrument of government.

## 21. FEDERAL REGULATION OF POLITICAL PARTIES: THE NEWBERRY CASE

By an act of 1911 Congress imposed stringent regulations as to the amounts of money that might be expended in campaigns for nomination and election to the offices of Senator or Representative. This act provided that candidates for the Senate might not spend more than allowed by the law of the state concerned, that sum in no case to exceed \$10,000. Under this act, senatorial candidates in Michigan were therefore entitled to spend only \$3,750. In 1918, Truman H. Newberry, a former Secretary of the Navy, was elected to the Senate over Henry Ford, but investigations revealed that approximately \$200,000 had been spent by him or on his behalf. Mr. Newberry and a number of others were thereupon indicted, tried, and convicted in federal court for violation of this act of Congress. This conviction was, however, reversed by the Supreme Court, all the judges agreeing that there had been technical errors in the trial of the case, and a bare majority holding the act in question to be unconstitutional. Proceedings to oust Mr. Newberry from his seat in the Senate were also pressed vigorously but unsuccessfully. The later elections of 1922, however, showed such strong public sentiment against the Senators who had supported him that Mr. Newberry resigned. The case is especially important as indicating the limits to congressional regulation of political party practices under the present interpretation of the Constitution.

[*Newberry v. United States* (1921), 256 U. S. 232, 257-258, 261-268; 65 L. Ed. 913, 921-925.]

Mr. Justice McReynolds delivered the opinion of the court:

...  
If it be practically true that, under present conditions, a designated party candidate is necessary for an election,—a preliminary thereto,—nevertheless his selection is in no real sense part of the manner of holding the election. This does not depend upon the scheme by which candidates are put forward. Whether the candidate be offered through primary, or convention, or petition, or request of a few, or as the result of his own unsupported ambition, does not directly affect the manner of holding the election. Birth must precede, but it is no part of either funeral or apotheosis.

Many things are prerequisites to elections or may affect their outcome,—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these. It is settled, e.g., that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacturing, mining, etc. commerce could not

exist; but this fact does not suffice to subject them to the control of Congress. *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

Election of Senators by state legislatures presupposed selection of their members by the people; but it would hardly be argued that therefore Congress could regulate such selection. In the Constitutional Convention of 1787, when replying to the suggestion that state legislatures should have uncontrolled power over elections of members of Congress, Mr. Madison said: "It seems as improper in principle, though it might be less inconvenient in practice, to give to the state legislatures this great authority over the election of the representatives of the people in the general legislature, as it would be to give to the latter a like power over the election of their representatives in the state legislatures." Supplement to Elliot's Debates, vol. 5, p. 402.

We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the state, and infringe upon liberties reserved to the people.

It should not be forgotten that, exercising inherent police power, the state may suppress whatever evils may be incident to primary or convention. As "each House shall be the judge of the elections, qualifications and returns of its own members," and as Congress may by law regulate the times, places, and manner of holding elections, the national government is not without power to protect itself against corruption, fraud, or other malign influences.

The judgment of the court below must be reversed and the cause remanded for further proceedings in conformity with this opinion.

[Justices Holmes, Day, Van Devanter, and McKenna concurred in this opinion, Justice McKenna reserving the question of the power of Congress under the 17th Amendment.]

Mr. Chief Justice White, dissenting from the opinion, but concurring, with a modification, in the judgment of reversal: . . .

The provisions of §§ 2 and 3 of article 1 of the Constitution, fixing the composition of the House of Representatives and of the

Senate, and providing for the election of Representatives by vote of the people of the several states, and of Senators by the state legislatures, were undoubtedly reservoirs of vital Federal power, constituting the generative sources of the provisions of § 4, clause 1, of the same article, creating the means for vivifying the bodies previously ordained. . . .

As without this grant no state power on the subject was possessed, it follows that the state power to create primaries as to United States Senators depended upon the grant for its existence. It also follows that, as the conferring of the power on the states and the reservation of the authority in Congress to regulate being absolutely coterminous, except as to the place of choosing Senators, which is not here relevant, it results that nothing is possible of being done under the former which is not subjected to the limitations imposed by the latter. And this is illustrated by the legislation of Congress and the decisions of this court, upholding the same. . . .

But it is said that, as the power which is challenged here is the right of a state to provide for and regulate a state primary for nominating United States Senators free from the control of Congress, and not the election of such Senators, therefore, as the nominating primary is one thing and the election another and different thing, the power of the state as to the primary is not governed by the right of Congress to regulate the times and manner of electing Senators. But the proposition is a suicidal one, since it at one and the same time retains in the state the only power it could possibly have, as delegated by the clause in question, and refuses to give effect to the regulating control which the clause confers on Congress as to that very power. And mark, this is emphasized by the consideration that there is no denial here that the states possess the power over the Federal subject resulting from the provision of the Constitution, but a holding that Congress may not exert, as to such power to regulate, authority which the terms of the identical clause of the Constitution confer upon it.

But, putting these contradictions aside, let me test the contention from other and distinct points of view: (1) In last analysis the contention must rest upon the proposition that there is such absolute want of relation between the power of government to regulate the right of the citizen to seek a nomination for a public office and its authority to regulate the election after nomination, that a paramount government authority having the right to regulate the latter is without any power as to the former. The influ-

ence of who is nominated for elective office upon the result of the election to fill that office is so known of all men that the proposition may be left to destroy itself by its own statement. . . .

The large number of states which at this day have by law established senatorial primaries shows the development of the movement which originated so long ago under the circumstances just stated. They serve to indicate the tenacity of the conviction that the relation of the primary to the election is so intimate that the influence of the former is largely determinative of the latter. I have appended in the margin a statement from a publication on the subject, showing how well-founded this conviction is and how it has come to pass that in some cases, at least, the result of the primary has been in substance to render the subsequent election merely perfunctory. Under these conditions I find it impossible to say that the admitted power of Congress to control and regulate the election of Senators does not embrace, as appropriate to that power, the authority to regulate the primary held under state authority. . . .

[Justices Pitney, Brandeis, and Clarke concurred in this dissent, although filing a separate dissenting opinion.]

## 22. FEDERAL CORRUPT PRACTICES ACT

The necessity of regulating in some manner the conduct and financing of political campaigns has long been recognized, and most of the states have passed legislation dealing with these matters in more or less detail. Although Congress does not have power to regulate the practices of political parties as such, it is empowered by the Constitution to regulate the manner of electing members of Congress. Acting under this and other authority, Congress in 1907 prohibited campaign contributions from corporations, in 1910 limited the amounts that might be spent in election campaigns of Representatives and required publicity of all receipts and expenditures, and in 1911 extended these provisions to Senators and to campaigns for nomination. The Act of 1911 was declared unconstitutional in 1921, hence Congress in 1925 passed a new act, containing in revised form the substance of all these previous acts that was clearly within its power. This new act was passed as a rider to the Postal Salary Increase Act of that year, but is referred to as the Federal Corrupt Practices Act.

[U. S. Code of Laws in force Dec. 6, 1926, ch. 8. *U. S. Statutes at Large*, vol. 44, pt. 1, pp. 15-17.]

**Section 241. Definitions.**—When used in this chapter—(a) The term “election” includes a general or special election, and, in the case of a Resident Commissioner from the Philippine Islands, an election by the Philippine Legislature, but does not include a primary election or convention of a political party;



(b) The term "candidate" means an individual whose name is presented at an election for election as Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, whether or not such individual is elected;

(c) The term "political committee" includes any committee, association, or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of candidates or presidential and vice presidential electors (1) in two or more States, or (2) whether or not in more than one State if such committee, association, or organization (other than a duly organized State or local committee of a political party) is a branch or subsidiary of a national committee, association, or organization;

(d) The term "contribution" includes a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable to make a contribution;

(e) The term "expenditure" includes a payment, distribution, loan, advance, deposit, or gift, of money, or any thing of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure;

(f) The term "person" includes an individual, partnership, committee, association, corporation, and any other organization or group of persons;

(g) The term "Clerk" means the Clerk of the House of Representatives of the United States;

(h) The term "Secretary" means the Secretary of the Senate of the United States;

(i) The term "State" includes Territory and possession of the United States. . . .

242. Chairman and treasurer of political committee; duties as to contributions; accounts and receipts.—(a) Every political committee shall have a chairman and a treasurer. No contribution shall be accepted, and no expenditure made, by or on behalf of a political committee for the purpose of influencing an election until such chairman and treasurer have been chosen.

(b) It shall be the duty of the treasurer of a political committee to keep a detailed and exact account of—

(1) All contributions made to or for such committee;

(2) The name and address of every person making any such contributions, and the date thereof;

(3) All expenditures made by or on behalf of such committee; and

(4) The name and address of every person to whom any such expenditure is made, and the date thereof.

(c) It shall be the duty of the treasurer to obtain and keep a receipted bill, stating the particulars, for every expenditure by or on behalf of a political committee exceeding \$10 in amount. The treasurer shall preserve all receipted bills and accounts required to be kept by this section for a period of at least two years from the date of the filing of the statement containing such items. . . .

**243. Accounts of contributions received.**—Every person who receives a contribution for a political committee shall, on demand of the treasurer, and in any event within five days after the receipt of such contribution, render to the treasurer a detailed account thereof, including the name and address of the person making such contribution, and the date on which received. . . .

**244. Statements by treasurer filed with Clerk of House of Representatives.**—(a) The treasurer of a political committee shall file with the Clerk between the 1st and 10th days of March, June, and September, in each year, and also between the 10th and 15th days, and on the 5th day, next preceding the date on which a general election is to be held, at which candidates are to be elected in two or more States, and also on the 1st day of January, a statement containing, complete as of the day next preceding the date of filing—

(1) The name and address of each person who has made a contribution to or for such committee in one or more items of the aggregate amount or value, within the calendar year, of \$100 or more, together with the amount and date of such contribution;

(2) The total sum of the contributions made to or for such committee during the calendar year and not stated under paragraph (1);

(3) The total sum of all contributions made to or for such committee during the calendar year;

(4) The name and address of each person to whom an expenditure in one or more items of the aggregate amount or value, within the calendar year, of \$10 or more has been made by or on behalf of such committee, and the amount, date, and purpose of such expenditure;

(5) The total sum of all expenditures made by or on behalf of such committee during the calendar year and not stated under paragraph (4);

(6) The total sum of expenditures made by or on behalf of such committee during the calendar year.

(b) The statements required to be filed by subdivision (a)

shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous statement only the amount need be carried forward.

(c) The statement filed on the 1st day of January shall cover the preceding calendar year. . . .

**245. Statements by others than political committee filed with Clerk of House of Representatives.**—Every person (other than a political committee) who makes an expenditure in one or more items, other than by contribution to a political committee, aggregating \$50 or more within a calendar year for the purpose of influencing in two or more States the election of candidates, shall file with the Clerk an itemized detailed statement of such expenditure in the same manner as required of the treasurer of a political committee by section 244 of this title. . . .

**246. Statements by candidates for Senator, Representative, Delegate, or Resident Commissioner filed with Secretary of Senate and Clerk of House of Representatives.**—(a) Every candidate for Senator shall file with the Secretary and every candidate for Representative, Delegate, or Resident Commissioner shall file with the Clerk not less than ten nor more than fifteen days before, and also within thirty days after, the date on which an election is to be held, a statement containing, complete as of the day next preceding the date of filing—

(1) A correct and itemized account of each contribution received by him or by any person from him with his knowledge or consent, from any source, in aid or support of his candidacy for election, or for the purpose of influencing the result of the election, together with the name of the person who has made such contribution;

(2) A correct and itemized account of each expenditure made by him or by any person for him with his knowledge or consent, in aid or support of his candidacy for election, or for the purpose of influencing the result of the election, together with the name of the person to whom such expenditure was made; except that only the total sum of expenditures for items specified in subdivision (c) of section 248 of this title need be stated;

(3) A statement of every promise or pledge made by him or by any person for him with his consent, prior to the closing of the polls on the day of the election, relative to the appointment or recommendation for appointment of any person to any public or private position or employment for the purpose of procuring support in his candidacy, and the name, address, and occupation of every person to whom any such promise or pledge has been

made, together with the description of any such position. If no such promise or pledge has been made, that fact shall be specifically stated.

(b) The statements required to be filed by subdivision (a) shall be cumulative, but where there has been no change in an item reported in a previous statement only the amount need be carried forward.

(c) Every candidate shall inclose with his first statement a report, based upon the records of the proper State official, stating the total number of votes cast for all candidates for the office which the candidate seeks, at the general election next preceding the election at which he is a candidate. . . .

**247. Statements; verification; filing; preservation; inspection.**  
—A statement required by this chapter to be filed by a candidate or treasurer of a political committee or other person with the Clerk or Secretary, as the case may be—

(a) Shall be verified by the oath or affirmation of the person filing such statement, taken before any officer authorized to administer oaths;

(b) Shall be deemed properly filed when deposited in an established post office within the prescribed time, duly stamped, registered, and directed to the Clerk or Secretary at Washington, District of Columbia, but in the event it is not received, a duplicate of such statement shall be promptly filed upon notice by the Clerk or Secretary of its nonreceipt;

(c) Shall be preserved by the Clerk or Secretary for a period of two years from the date of filing, shall constitute a part of the public records of his office, and shall be open to public inspection. . . .

**248. Limitation upon amount of expenditures by candidate.—**

(a) A candidate, in his campaign for election, shall not make expenditures in excess of the amount which he may lawfully make under the laws of the State in which he is a candidate, nor in excess of the amount which he may lawfully make under the provisions of this title.

(b) Unless the laws of his State prescribe a less amount as the maximum limit of campaign expenditures, a candidate may make expenditures up to—

(1) The sum of \$10,000 if a candidate for Senator, or the sum of \$2,500 if a candidate for Representative, Delegate, or Resident Commissioner; or

(2) An amount equal to the amount obtained by multiplying three cents by the total number of votes cast at the last general

election for all candidates for the office which the candidate seeks, but in no event exceeding \$25,000 if a candidate for Senator or \$5,000 if a candidate for Representative, Delegate, or Resident Commissioner.

(c) Money expended by a candidate to meet and discharge any assessment, fee, or charge made or levied upon candidates by the laws of the State in which he resides, or expended for his necessary personal, traveling, or subsistence expenses, or for stationery, postage, writing, or printing (other than for use on billboards or in newspapers), for distributing letters, circulars, or posters, or for telegraph or telephone service, shall not be included in determining whether his expenditures have exceeded the sum fixed by paragraph (1) or (2) of subdivision (b) as the limit of campaign expenses of a candidate. . . .

249. Promises or pledges by candidate.—It is unlawful for any candidate to directly or indirectly promise or pledge the appointment, or the use of his influence or support for the appointment of any person to any public or private position or employment, for the purpose of procuring support in his candidacy. . . .

250. Expenditures to influence voting.—It is unlawful for any person to make or offer to make an expenditure, or to cause an expenditure to be made or offered, to any person, either to vote or withhold his vote, or to vote for or against any candidate, and it is unlawful for any person to solicit, accept, or receive any such expenditure in consideration of his vote or the withholding of his vote. . . .

251. Contributions by national banks or other Federal corporations; penalty.—It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution in connection with any election to any political office, or for any corporation whatever to make a contribution in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation which makes any contribution in violation of this section shall be fined not more than \$5,000; and every officer or director of any corporation who consents to any contribution by the corporation in violation of this section shall be fined not more than \$1,000, or imprisoned not more than one year, or both. . . .

252. General penalties for violations.—(a) Any person who

violates any of the foregoing provisions of this chapter, except those for which a specific penalty is imposed by section 208 of Title 18, and section 251 of this title, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(b) Any person who willfully violates any of the foregoing provisions of this chapter, except those for which a specific penalty is imposed by section 208 of Title 18, and section 251 of this title, shall be fined not more than \$10,000 and imprisoned not more than two years. . . .

253. Expenses of election contests.—This chapter shall not limit or affect the right of any person to make expenditures for proper legal expenses in contesting the results of an election. . . .

254. State laws not affected.—This chapter shall not be construed to annul the laws of any State relating to the nomination or election of candidates, unless directly inconsistent with the provisions of this title, or to exempt any candidate from complying with such State laws. . . .

255. Partial invalidity.—If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the validity of the remainder of the chapter and of the application of such provision to other persons and circumstances shall not be affected thereby. . . .

256. Citation.—This chapter may be cited as the "Federal Corrupt Practices Act." . . .

## 23. REGULATION OF NATIONAL PARTY ORGANIZATION

Congress has not yet attempted any regulation of the national party organizations, and it is doubtful whether any such legislation would be upheld by the courts. Each party is therefore apparently free to determine the character of its own national organization for itself. With the institution of the direct primary, however, several states have provided by law for the method by which the member or members of the National Committee from those states shall be selected. Although there is some question whether such state legislation is actually binding upon the national party organizations, the parties have in recent years generally accepted these regulations as though they were binding. An element of state or popular control of the national party organization has thus been introduced into our political system.

### a. Composition of Republican National Committee

[Rule XIV, in *Official Proceedings, Republican National Convention, 1924*, pp. 93-95.]

A National Committee shall be elected by each National Convention called to nominate candidates for President and Vice

President consisting of two members from each State, Territory, or Territorial Possession.

The roll shall be called and the delegation from each state, territory and territorial possession shall nominate, through its Chairman, one man and one woman to act as such members.

When the law of any state provides a method for the selection of members of National Committees of political parties, the nomination of the members of the Republican National Committee in accordance with the provisions of such law shall be considered nominations to be carried into effect by the delegation from such State; provided, however, that in the Republican National Convention of 1924, every State and Territorial possession shall nominate for membership in the National Committee a woman as well as a man, to serve pending an appropriate amendment to State laws.

If nominations be not made in accordance with law, instructions by State and District Conventions to delegates to the National Convention shall be obeyed; and if not obeyed, may be made operative by a vote of the National Convention.

When the delegates from each State, Territory and Territorial Possession shall have so nominated a member of the National Committee, the Convention shall thereupon elect the person so nominated to serve as a member of the Committee until the meeting of the National Committee elected by the next National Convention. . . .

Vacancies in the National Committee shall be filled by the Committee upon the nomination of the Republican State Committee in and for the State, Territory or Territorial Possession in which the vacancy occurs.

The National Committee shall, however, have power to declare vacant the seat of any member who refuses to support the nominees of the Convention which elected such National Committee, and to fill such vacancies.

### b. Composition of Democratic National Committee

[Resolution adopted by Democratic National Convention, 1924, in *Official Proceedings, Democratic National Convention, 1924*, pp. 222-223.]

*Resolved*, That the National Committee shall consist of one man and one woman from each State, District and Territory, the members of said committee to be selected in the manner prescribed by the laws of their respective States and Territories;

and where there be no statutory provision, that method of selection shall be pursued which conforms to the established party customs and precedents, or to the regularly adopted party rules and regulations. All such selections shall be acted upon by the Democratic National Convention, and the members of the Committee whose selection is ratified and confirmed shall hold office until the adjournment of the succeeding National Convention or until their successors shall be chosen. In case of a vacancy it shall be filled by the respective State, Territorial or District Committee.

#### c. Selection of National Committeeman in Oregon

[*Oregon Election Laws, 1921-1922*, pp. 51-52.]

§ 3966. A political party within the meaning of section 3965 shall elect its national committeeman as herein provided and not otherwise.

§ 3967. At the general primary nominating election held in 1914, and every four years thereafter, every political party as defined in section 3966, shall elect its member of the national committee. A candidate for such office shall file his nominating petition with the secretary of state as now required by candidates for state offices. Such petition shall be signed by at least 200 qualified voters of the political party of such candidate. The names of all such candidates shall be printed on the primary election ballots of the respective political parties of which they are candidates, and shall be voted for only by the members of the party of which any such person is a candidate. A plurality shall be sufficient to elect, and any person so elected shall hold office until his successor is elected. In case of a vacancy by death, resignation or otherwise, such vacancy shall be filled for the unexpired term by the state central committee of the party in which such office of national committeeman is vacant. Except as herein otherwise provided, existing provisions of law relating to elections are hereby made applicable to the election of national committeeman.

#### d. Selection of National Committeeman in West Virginia

[*General Election Laws of West Virginia, 1922*, p. 76.]

27 . . . National committeemen shall be elected by the state committee of each respective party, unless the rules of the na-



tional party otherwise provide, in which case they shall be elected in the manner provided by the rules of the national party. . . .

Vacancies happening at any time in the office of national committeemen shall be filled by the state committee of the respective parties, unless the rules of the national party otherwise provide. . . .

## CHAPTER V

### THE PRESIDENT: SELECTION AND TENURE

#### 24. THE TWO-TERM TRADITION

Among the most difficult questions before the Constitutional Convention of 1787 were those relating to tenure and the manner of selection of the President. Many members favored a single term of six or seven years (a proposal which has been renewed on numerous occasions since), but it was finally decided to give the President a relatively short term and to impose no limitation on his eligibility for reelection. This was felt by a considerable number to be one of the most dangerous features of the new Constitution, opening the way to a monarchy or even to a dictatorship, an opinion reflected by Jefferson when he wrote, "Experience concurs with reason in concluding that the first magistrate will always be re-elected if the Constitution permits it."<sup>1</sup> The examples of Washington and Jefferson in declining to serve more than two terms have, however, established precedents that have as yet not been broken. Grant in 1880, and Roosevelt in 1912, are the only Presidents who have sought a third term, in each case without success. President Coolidge was supposed for some time to be desirous of a third term, but settled the question in the summer of 1927 by his laconic statement, "I do not choose to run for President in 1928." Whether the two-term tradition thus established has become a binding feature of our constitutional system, and particularly whether that tradition should apply to a Vice President who succeeds for only part of a term, are questions that have aroused much interest and discussion. Grant's ambition brought forth a House declaration against a third term, which was repeated by the Senate in identical language in February, 1928, when there was renewed talk of "drafting" President Coolidge.

##### a. Statement of Washington

[Farewell Address, Sept. 17, 1796. *Writings of George Washington* (Ford ed., published by G. P. Putnam's Sons), vol. XIII, pp. 277-281.]

FRIENDS, AND FELLOW-CITIZENS,

The period for a new election of a Citizen, to administer the Executive Government of the United States, being not far distant, and the time actually arrived, when your thoughts must be employed in designating the person, who is to be clothed with that important trust, it appears to me proper, especially as it

<sup>1</sup> Letter to Madison, Dec. 20, 1787. *Writings of Thomas Jefferson* (Ford ed.), vol. IV, p. 477.

may conduce to a more distinct expression of the public voice, that I should now apprise you of the resolution I have formed, to decline being considered among the number of those, out of whom a choice is to be made.

I beg you, at the same time, to do me the justice to be assured, that this resolution has not been taken, without a strict regard to all the considerations appertaining to the relation, which binds a dutiful citizen to his country—and that, in withdrawing the tender of service which silence in my situation might imply, I am influenced by no diminution of zeal for your future interest, no deficiency of grateful respect for your past kindness; but act under [and] am supported by a full conviction that the step is compatible with both.

The acceptance of, and continuance hitherto in, the office to which your suffrages have twice called me, have been a uniform sacrifice of inclination to the opinion of duty, and to a deference for what appeared to be your desire.—I constantly hoped, that it would have been much earlier in my power, consistently with motives, which I was not at liberty to disregard, to return to that retirement, from which I had been reluctantly drawn.—The strength of my inclination to do this, previous to the last election, had even led to the preparation of an address to declare it to you; but mature reflection on the then perplexed and critical posture of our affairs with foreign Nations, and the unanimous advice of persons entitled to my confidence, impelled me to abandon the idea.—

I rejoice that the state of your concerns, external as well as internal, no longer renders the pursuit of inclination incompatible with the sentiment of duty, or propriety; and am persuaded, whatever partiality may be retained for my services, that, in the present circumstances of our country, you will not disapprove of my determination to retire. . . .

#### b. Statement of Jefferson

[Letter to John Taylor. *Writings of Thomas Jefferson* (Ford ed., published by G. P. Putnam's Sons), vol. VIII, pp. 338-340.]

Washington, Jan. 6, 1805.

DEAR SIR,—Your favor of Dec. 26th has been duly received, and was received as a proof of your friendly partialities to me, of which I have so often had reason to be sensible. My opinion originally was that the President of the U. S. should have been elected for 7. years, & forever ineligible afterwards. I have since

become sensible that 7. years is too long to be irremovable, and that there should be a peaceable way of withdrawing a man in midway who is doing wrong. The service for 8. years with a power to remove at the end of the first four, comes nearly to my principle as corrected by experience. And it is in adherence to that that I determined to withdraw at the end of my second term. The danger is that the indulgence & attachments of the people will keep a man in the chair after he becomes a dotard, that reelection through life shall become habitual, & election for life follow that. Genl. Washington set the example of voluntary retirement after 8. years. I shall follow it, and a few more precedents will oppose the obstacle of habit to anyone after a while who shall endeavor to extend his term. Perhaps it may beget a disposition to establish it by an amendment of the constitution. I believe I am doing right, therefore, in pursuing my principle. I had determined to declare my intention, but I have consented to be silent on the opinion of friends, who think it best not to put a continuance out of my power in defiance of all circumstances. There is, however, but one circumstance which could engage my acquiescence in another election, to wit, such a division about a successor as might bring in a Monarchist. But this circumstance is impossible. While, therefore, I shall make no formal declarations to the public of my purpose,<sup>1</sup> I have freely let it be understood in private conversation. In this I am persuaded yourself & my friends generally will approve of my views: and should I at the end of a 2d term carry into retirement all the favor which the 1st has acquired, I shall feel the consolation of having done all the good in my power, and expect with more than composure the termination of a life no longer valuable to others or of importance to myself. Accept my affectionate salutations & assurances of great esteem & respect.

### c. Statement of Roosevelt

[White House statement, issued on election night, Nov. 8, 1904.  
Text in *N. Y. Times*, Feb. 20, 1927.]

I am deeply sensible of the honor done me by the American people in thus expressing their confidence in what I have done and have tried to do. I appreciate to the full the solemn responsibility this confidence imposes upon me, and I shall do all that in my power lies not to forfeit it. On the 4th of March

<sup>1</sup> This declaration was repeated publicly and in similar language in a letter to the Vermont legislature, Dec. 10, 1807, reprinted in *N. Y. Times*, Feb. 20, 1927.

next I shall have served three and one-half years, and this three and one-half years constitutes my first term. The wise custom which limits the President to two terms regards the substance and not the form. Under no circumstances will I be a candidate for or accept another nomination.

THEODORE ROOSEVELT.

#### d. Declaration of House of Representatives

[House Resolution of Dec. 15, 1875; offered by Wm. M. Springer (Ill.), and adopted by vote of 233-18, with apparently no debate. *Congressional Record*, vol. 4, p. 228.]

*Resolved*, That in the opinion of this House, the precedent established by Washington and other Presidents of the United States, in retiring from the presidential office after their second term, has become, by universal concurrence, a part of our republican system of government, and that any departure from this time-honored custom would be unwise, unpatriotic, and fraught with peril to our free institutions.

### 25. PRESIDENTIAL SUCCESSION ACT OF 1886

Acting under its constitutional power to provide for the succession to the Presidency beyond the Vice President, Congress in 1792 passed an act vesting such succession, first, in the President pro tempore of the Senate, and next after him, in the Speaker of the House. During the summer of 1881, after President Garfield had been shot and was lingering at the point of death, it happened that Vice President Arthur became seriously ill and that there was neither a President of the Senate nor a Speaker of the House, the old Congress having expired and the new Congress not having yet been organized. The danger that the country might under this arrangement be left without a President led to the passage in 1886 of the second Succession Act, which is still in force.

[*U. S. Statutes*, vol. 24, pt. 1, pp. 1-2.]

CHAP. 4.—An act to provide for the performance of the duties of the office of President in case of the removal, death, resignation, or inability both of the President and Vice-President.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in case of removal, death, resignation, or inability of both the President and Vice-President of the United States, the Secretary of State, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Treasury, or

if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of War, or if there be none, or in case of his removal, death, resignation, or inability, then the Attorney-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Postmaster-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Navy, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Interior, shall act as President until the disability of the President or Vice-President is removed or a President shall be elected: *Provided*, That whenever the powers and duties of the office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting.

SEC. 2. That the preceding section shall only be held to describe and apply to such officers as shall have been appointed by the advice and consent of the Senate to the offices therein named, and such as are eligible to the office of President under the Constitution, and not under impeachment by the House of Representatives of the United States at the time the powers and duties of the office shall devolve upon them respectively.

SEC. 3. That sections one hundred and forty-six, one hundred and forty-seven, one hundred and forty-eight, one hundred and forty-nine, and one hundred and fifty of the Revised Statutes are hereby repealed.

Approved, January 19, 1886.

## 26. PRESIDENTIAL INABILITY

The Constitution provides that the Vice President shall succeed to the Presidency in case of the President's removal, death, resignation, or inability to act. What constitutes "inability" is not in itself clear, nor is it further defined in the Constitution. Furthermore, no officer or organ of government is given power to determine when the President is disabled to such an extent as to require the succession of the Vice President. The question became especially acute during the illnesses of President Garfield in 1881 and of President Wilson in 1919. In both cases the President was for a considerable period completely unable to function, and the Vice President declined to act, feeling himself without proper authority. The serious illness of President Wilson brought about a renewal of discussion on the question, an investigation by a Senate committee into the President's com-

petence, and several proposals to remedy the situation, none of which were adopted.

### a. Inability of President Wilson

[From *The True Story of Woodrow Wilson* by David Lawrence (George H. Doran Company, copyright 1924), pp. 283-285, 288.]

No period in American history parallels that in which the Government of the United States had no President for, immediately following Woodrow Wilson's physical breakdown, he was unable to function as the Chief Executive.

Opinions may differ as to whether any important piece of public business was neglected—the Cabinet took care of every decision and executed every policy. But there can be no doubt that, for a few days at least, after his return from the Western trip, the President was disabled. For a long time thereafter he was unable to discharge the duties of his office to the extent that he had in the preceding years of his term.

Serious moments there were when it was thought Mr. Wilson would not live. As the crisis was passed and it became apparent that the President would be unable to see many callers or write extended communications on matters of state, his supporters developed the fear that in the Senate or elsewhere there might be raised the question of succession, under the Constitution, which provides that the Vice President shall succeed the President in case of inability.

The Constitution itself is not very clear on the question of what shall be done when a President is disabled. It says:

“In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.”

Is the Vice President to become President or merely assume the duties and discharge the powers of the Presidential office until the President's disability is removed? No Vice President has ever assumed office on the disability of a President, and Mr. Thomas R. Marshall, who was Vice President during President Wilson's incapacity, made no effort to succeed him. Congress

has never passed a law specifically giving the procedure that should be followed in case of Presidential inability.

After the President suffered a stroke his condition was so alarming that he was unable for several days to sign documents or attend to public business. The Secretary of State, Robert Lansing, called at the Executive Offices to learn the true condition of the President because the King and Queen of the Belgians, who were in New York, had expressed a desire to come to Washington if they would be received. Rear Admiral Cary T. Grayson, the President's physician, told Mr. Lansing that Mr. Wilson was in no condition to receive the King and Queen, much as he would like to do so, and that, perhaps, if their itinerary were rearranged the visit might be accomplished later on. Mr. Lansing was unable to obtain any definite information as to the true nature of the President's illness.

The next day he asked Secretary Tumulty whether the President was able to sign documents and carry on his duties. Mr. Lansing relates that he expressed to both Admiral Grayson and Mr. Tumulty the fear that a demand might be made in Congress to have the Vice President take office under the disability article of the Constitution. Secretary Tumulty voiced indignation that anyone in Congress would consider such a thing, while Dr. Grayson pointed out that he would not certify as a physician that the President was incapacitated for duty. Both Admiral Grayson and Secretary Tumulty, however, are credited by Mr. Lansing with having agreed with his plan of calling Cabinet meetings. The first notices to Cabinet members were sent through the telephone switchboard in the White House. Admiral Grayson attended the first meeting and reported on the improvement in Mr. Wilson's condition. There was no discussion about the Vice President succeeding Mr. Wilson either at the first or any of the Cabinet meetings which followed.

. . . . .

There is no doubt Mr. Wilson's condition became much better after the first few weeks of his illness and that, by the month of February, when he called for the resignation of Secretary Lansing, he had recovered sufficiently to do at least one or two hours of work each day.

The President's shaky signature to public documents and the gradual improvement thereafter in his handwriting tell a story of how difficult it was for the President to carry on in his hours of physical distress. Only the most important matters were



placed before him in the limited time that his physicians said he could afford to give to public business.

Unfavorable news was withheld from Mr. Wilson and nothing was done that was in the least calculated to excite or disturb. The President was given to emotional outbursts, wept very often, and grew melancholy over his breakdown.

Throughout this period Mrs. Wilson was constantly at his bedside as was also his eldest daughter, Miss Margaret. The devotion of the wife and daughter was no small factor in nursing the President back to more and more participation in public affairs. Mrs. Wilson stood between her husband and the Government, indeed between him and the outside world. It was she who acted as personal secretary, taking notes and writing memoranda and messages to the various Cabinet officers and officials of the Government generally. Even the Private Secretary, Mr. Tumulty, refrained from entering the bedchamber except when sent for. He placed his memoranda on vital questions before Mrs. Wilson, leaving it to her to discover the proper moment to ask the President for his opinion or decision. She was, so to speak, the reigning monarch.

#### b. Report of Senate Committee, 1920

[Letter from ex-Senator Gilbert M. Hitchcock to Clarence A. Berdahl; reprinted by permission.]

Omaha, Nebraska,  
November 7, 1927.

Dear Sir:

. . . As I recall the facts, the selection of the sub-committee was entirely informal, and the occurrence was about as follows—

Senator Fall had several times declared in a meeting of the Foreign Relations Committee that in his opinion President Wilson was unable to function as President of the United States, that Mrs. Wilson was practically acting in that capacity, and that an inquiry should be made.

One day, after Fall had made such a statement in rather an offensive way, I suggested that the President probably would not object if Mr. Fall himself would make an investigation. He at once said he thought the Committee should appoint someone, and that if it would appoint him he would be glad to go. Some member of the Committee suggested that it would hardly do to send a single member of the Committee, and that if Mr. Fall went I should be named with him to represent the minority of

the Committee. Thereupon quite informally that was agreed to, a motion was made, and the chairman was instructed to inquire of the White House whether a visit from such a committee would be welcome, and, if so, at what time. Senator Lodge acted on the authority, and at once secured a telephoned reply from the White House that we could come up that afternoon.

We went up, and were escorted into the President's bedroom, where he lay propped up in bed. To the evident surprise of Senator Fall, the President held out his hand and shook hands with Fall vigorously, and motioned him to a seat by the bedside. Thereupon a lively conversation ensued, chiefly on the subject of Mexican relations, pointed several times with witticisms and stories on the part of the President. I had been at the bedside on numerous occasions during the President's illness, and therefore took no part in the conversation. Senator Fall hardly got over his surprise to find the President so active and alert mentally, and in the course of fifteen or twenty minutes I suggested that we bring our visit to an end.

No written report of that little call was ever made to the Committee, but Senator Fall confessed himself completely satisfied, and made no further claim that the President was incompetent. He made this confession first to the crowd of newspaper men awaiting our exit from the White House, and in the next meeting of the Committee on Foreign Relations the matter was laughed off and dropped.

Fall, like many others, had previously been completely convinced that the President was so paralyzed that he could not sign his documents, and the President's vigorous handshake was the first shock of the disillusion. As a matter of fact, it was not known that it was the left arm which was paralyzed and concealed by the covers; and as a matter of fact also, I realized that the President braced himself for this interview with Fall, aided by his strong will power.

I am frank to say that one of our serious lacks in the United States is the total absence of any legislation to carry into effect the constitutional provision that in case of the disability of the President the Vice-President shall act. There should be enacted some legislation by Congress providing a summary proceeding to investigate the question of disability whenever it shall arise in the future, and in this investigation it seems to me both Houses of Congress and the Supreme Court should have a part.

It is quite conceivable that in the future there may arise this situation of doubt and uncertainty, without any method at hand

dispassionately to determine whether, as a matter of fact, presidential disability exists.

Yours truly,  
(Signed) G. M. HITCHCOCK.

### c. View of Vice President Marshall

[Statement, Nov. 26, 1918, in view of President Wilson's proposed attendance upon the Peace Conference in Paris. *N. Y. Times*, Nov. 27, 1918.]

One—With regard to the suggestion that I might voluntarily assume the Presidency and raise a legal question as to my right of tenure by some such act as the signing of a legislative bill: I can state now definitely and positively that I shall not of my own volition assume President Wilson's office or the duties thereof if the President departs from the United States to attend the Peace Conference.

Two—As for the suggestion that a joint resolution of Congress might be adopted to "set the Vice President in motion": This proposal is entirely new to me, and I am unable to commit myself as to what I would do if the Congress should adopt jointly such a resolution.

Three—In answer to the suggestion that a court having jurisdiction might mandamus me to assume the duties of the President: I unquestionably would assume the Presidency of the United States and exercise the duties of that office if a court having jurisdiction directed me to do so.

My relations with President Wilson have been extremely warm and friendly and cordial, and they are so today. For that reason I cannot emphasize too strongly that I do not wish to say anything that might convey the impression that I think he should not go to the Peace Conference if he sees fit to go. Furthermore, I do not want to say one word that might give the impression that I was participating in any discussion of constitutionality, or precedent, or propriety, which is designed to make him hesitate or to induce him to abandon his journey.

I have assumed from the first that there was no barrier to Mr. Wilson's leaving the country to attend the Peace Conference if he decided that it was his duty to go abroad for that purpose. The only discussion as to the constitutionality of such an act that I have heard was a brief one to which I listened recently, and which concerned itself solely with the President's right to go, and

not with any question as to what would happen at home if he did go.

I emphasize that because I am particularly anxious that the public should understand that I have taken no position in opposition to the President's going, and I most certainly want him to know beyond a doubt that, so far as I have formed any opinion, that opinion has been that he certainly could go if he wanted to. . . .

Of course, I am aware of [the] constitutional provision, but I repeat I have not considered it in connection with Mr. Wilson's forthcoming trip. I never dreamed of any trouble arising. I can say to you that not voluntarily shall I assume the office of President of the United States. If I should become President during Mr. Wilson's absence, unquestionably that would have to occur through some judicial or legislative process. The idea of its occurring through legislative process is new to me, so I cannot attempt to say now what I would do if the two houses of Congress in joint resolution should call upon me to act. That is a responsibility that would have to be met when it arose and if it arose. The possibility of judicial action is a different one. If that should be taken and a court possessed of jurisdiction should order me to assume the Presidency, I certainly would obey that court, and I would assume and discharge the duties of the Presidency.

I have made no investigation of this subject. I saw no reason to. The President decided it was right and proper for him to go to the Peace Conference, and I supported his decision heartily and cordially. Most certainly I do not want his job while he is away. That does not mean that I am dodging responsibility. I am not. If the question should arise, I would meet it squarely and accept whatever responsibility was placed upon me. I am most reluctant to become involved in any academic discussion of the constitutional or other questions involved, because I am fearful that my participation in such a discussion might give the President the impression that I am in some way opposing his going. I am not. Furthermore, as I said, I have not studied these questions for the reason that I did not anticipate anything arising which would force them upon me.

## 27. PRESIDENTIAL BALLOT

The Constitution provides that Presidential Electors are to be chosen as the legislature of each state may determine, but that the time of their election and meeting is to be determined by Congress. Accordingly Congress

has fixed a uniform day for the selection of these Electors and provided the details of their meeting and balloting for President, as illustrated below. The method of selection, however, varied at first, the Electors being chosen in some states by popular election, in others by the legislature itself. The method of popular election became uniform in all the states by 1864, and later the Electors were also uniformly chosen at large, instead of by districts. In view of the fact that these Electors no longer express their own choice for President, but merely register the choice of their party, the most recent tendency is to eliminate their names from the ballot altogether, and provide some other method for their selection and at the same time for registering the voter's choice for President. Nebraska in 1917, Iowa in 1919, and Illinois in 1927, have provided laws of this character, differing from one another in detail, but agreeing on the general principle.

#### a. Act of Congress with respect to Presidential Electors, 1887

[*U. S. Statutes*, vol. 24, pt. 2, pp. 373-375.]

CHAP. 90.—An act to fix the day for the meeting of the electors of President and Vice President, and to provide for and regulate the counting of the votes for President and Vice President, and the decision of questions arising thereon.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the electors of each State shall meet and give their votes on the second Monday in January<sup>1</sup> next following their appointment, at such place in each State as the legislature of such State shall direct.

SEC. 2. That if any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to the said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

SEC. 3. That it shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of electors in such State, by the final ascertainment under and in pursuance of the laws of such State provid-

<sup>1</sup> Changed by Act of May 29, 1928, to first Wednesday in January. *U. S. Statutes*, vol. 45, p. 945.

ing for such ascertainment, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by the preceding section to meet, the same certificate, in triplicate, under the seal of the State; and such certificate shall be inclosed and transmitted by the electors at the same time and in the same manner as is provided by law for transmitting by such electors to the seat of Government the lists of all persons voted for as President and of all persons voted for as Vice President; and section one hundred and thirty-six of the Revised Statutes is hereby repealed; and if there shall have been any final determination in a State of a controversy or contest as provided for in section two of this act, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such determination, in form and manner as the same shall have been made; and the Secretary of State of the United States, as soon as practicable after the receipt at the State Department of each of the certificates hereinbefore directed to be transmitted to the Secretary of State, shall publish, in such public newspaper as he shall designate, such certificates in full; and at the first meeting of Congress thereafter he shall transmit to the two Houses of Congress copies in full of each and every such certificate so received theretofore at the State Department.

SEC. 4. That Congress shall be in session on the second Wednesday in February succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of one o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hear-

ing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted in the manner and according to the rules in this act provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed as sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section three of this act from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section two of this act to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section two of this act, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so au-

thorized by its laws; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the Executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

SEC. 5. That while the two Houses shall be in meeting as provided in this act the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw.

SEC. 6. That when the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate.

SEC. 7. That at such joint meeting of the two Houses seats shall be provided as follows: For the President of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators, in the body of the Hall upon the right of the presiding officer; for the Representatives, in the body of the Hall not provided for the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two Houses, in front of the Clerk's desk and upon each side of the Speaker's platform. Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting



any such votes, or otherwise under this act, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of ten o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first meeting of the two Houses, no further or other recess shall be taken by either House.

Approved, February 3, 1887.

### b. Illinois Law with respect to Presidential Electors

[*Laws of Illinois, 1927*, pp. 450-453.]

*Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

SECTION 1. Sections 1, 2, 3, 4, and 5 of "An Act in regard to elections, and to provide for filling vacancies in elective offices," approved April 3, 1872, as amended, are amended to read as follows:

§ 1. That there shall be elected by general ticket in the manner and with the effect hereinafter provided, on the Tuesday next after the first Monday in November preceding the expiration of the term of office of each President of the United States, as many electors of President and Vice President of the United States as this State may be entitled to elect; which election shall be conducted and returns thereof made as hereinafter provided: *Provided*, that if Congress should hereafter fix a different day for such election, then the election for electors shall be held on such day as shall be named by Act of Congress. The choosing, and election of electors aforesaid shall be made in the following manner:

(a) In each year in which a President and Vice President of the United States are chosen, each political party or group in this State shall choose by its State convention electors of President and Vice President of the United States and such State convention of such party or group shall also choose electors at large, if any are to be appointed for this State and such State convention of such party or group shall by its chairman and secretary certify the total list of such electors together with electors at large so chosen to the Secretary of State of Illinois.

The filing of such certificate with said Secretary of State, of

such choosing of electors shall be deemed and taken to be the choosing and selection of the electors of this State, if such party or group is successful at the polls as herein provided in choosing their candidates for President and Vice President of the United States.

(b) The names of the candidates of the several political parties or groups for electors of President and Vice President shall not be printed on the official ballot to be voted in the election to be held on the day in this section first above named. In lieu of the names of the candidates for such electors of President and Vice President, immediately under the appellation of party name of a party or group in the column of its candidates on the official ballot, to be voted at said election first above named in this section, there shall be printed within a bracket the name of the candidate for President and the name of the candidate for Vice President of such party or group with a square to the left of such bracket. Each voter in this State from the several lists or sets of electors so chosen and selected by the said respective political parties or groups, may choose and elect one of such lists or sets of electors by placing a cross in the square to the left of the bracket aforesaid of one of such parties or groups.

Placing a cross within the square before the bracket enclosing the names of President and Vice President shall not be deemed and taken as a direct vote for such candidates for President and Vice President, or either of them, but shall only be deemed and taken to be a vote for the entire list or set of electors chosen by that political party or group so certified to the Secretary of State as herein provided.

(c) Such certification by the respective political parties or groups in this State of electors of President and Vice President shall be made to the Secretary of State within two days after such State convention.

(d) Should more than one certificate of choice and selection of electors of the same political party or group be filed by contesting conventions or contesting groups, it shall be the duty of the Governor, the Secretary of State, the Auditor of Public Accounts, the State Treasurer and the Attorney General within ten days after the adjournment of the last of such conventions to meet in the office of the Governor and determine which set of nominees for electors of such party or group was chosen and selected by the authorized convention of such party or group. The Secretary of State shall notify such State officers of the date, time and place of such meeting. At such meeting a majority of

the said officers present, after notice to the chairman and secretaries or managers of the conventions or groups and after a hearing shall determine which set of electors was so chosen by the authorized convention and shall so announce and publish the fact, and such decision shall be final and the set of electors so determined upon by said State officers to be so chosen shall be the list or set of electors to be deemed elected if that party shall be successful at the polls, as herein provided.

(e) Should a vacancy occur in the choice of an elector in a congressional district, such vacancy may be filled by the executive committee of the party or group for such congressional district, to be certified by such committee to the Secretary of State of Illinois. Should a vacancy occur in the office of elector at large, such vacancy shall be filled by the State committee of such political party or group, and certified by it to the Secretary of State of Illinois.

§ 2. The county clerks of the several counties shall, within eight days next after holding the election first named in section 1 of this Act, make three copies of the abstract of the votes cast for electors by each political party or group, as indicated by the voter, as aforesaid, by a cross in the square to the left of the bracket aforesaid, or as indicated by a cross in the appropriate place preceding the appellation or title of the particular political party or group, and transmit by mail one of said copies to the Governor, another to the office of the Secretary of State, and retain the third in his office, to be sent for by the Governor in case both the others should be mislaid. Within twenty days after the holding of such election, and sooner if all the returns are received by either the Governor or by the Secretary of State, the Secretary of State, Auditor of Public Accounts and Treasurer, or any two of them, shall, in the presence of the Governor, proceed to open and canvass said election returns and to declare which set of candidates for President and Vice President received, as aforesaid, the highest number of votes cast at such election as aforesaid; and the electors of that party whose candidates for President and Vice President received the highest number of votes so cast shall be taken and deemed to be elected as electors of President and Vice President but should two or more sets of candidates for President and Vice President be returned with an equal and the highest vote, the said Secretary of State shall cause a notice of the same to be published, which notice shall name some day and place, not less than five days from the time of such publication of such notice, upon which the Governor, Attorney Gen-

eral, Secretary of State, Auditor of Public Accounts and State Treasurer will decide by lot which of said sets of candidates for President and Vice President so equal and highest shall be declared to be highest. And upon the day and at the place so appointed in said notice, the said Secretary, Auditor, Treasurer, Attorney General and Governor shall so decide by lot and declare which is deemed highest of the said sets of candidates for President and Vice President so equal and highest, thereby determining only that the electors chosen as aforesaid by such candidates' party or group are thereby elected by general ticket to be such electors.

§ 3. Within five days after the votes shall have been canvassed and the results declared or the result declared by lot as provided for in section 2 above, the Governor shall cause the result of said election to be published, and shall proclaim the persons electors of President and Vice President so chosen composing the list so elected, by transmitting by mail to the several persons so chosen and composing the list or set elected, electors of President and Vice President certificates in triplicate, under the Seal of State of their appointment, and shall also transmit under the Seal of State to the Secretary of State of the United States the certificate of the election of said electors as required by the laws of Congress.

§ 4. The electors, elected as aforesaid, shall meet at the office of the Secretary of State in a room to be designated by him in the Capitol at Springfield in this State, at the time appointed by the laws of the United States at the hour of ten o'clock in the forenoon of such day and give their votes for President and for Vice President of the United States, in the manner herein provided, and perform such duties as are or may be required by law. Each elector shall receive for every twenty miles necessary travel in going to the seat of government to give his vote and returning to his residence, to be computed by the most usual route, the sum of three dollars (\$3.00), to be paid on the warrant of the Auditor, out of any money in the treasury not otherwise appropriated, and any person appointed by the electors assembled to fill a vacancy shall also receive the compensation provided for electors appointed.

§ 5. In case any person duly elected an elector of President and Vice President of the United States shall fail to attend at the Capitol on the day on which his vote is required to be given, it shall be the duty of the elector or electors of President and Vice President, attending at the time and place, to appoint a

person to fill such vacancy; *provided*, that should the person or persons chosen, as in this Act provided, in the foregoing sections, arrive at the place aforesaid before the votes for President and Vice President are actually given, the person or persons appointed to fill such vacancy shall not act as elector of President and Vice President.

Approved July 11, 1927.

## 28. MINORITY PRESIDENTS

The electoral system established by the Constitution by no means ensures majority control in the selection of the President. With the introduction of the political party and the adoption by the states of election at large, the entire list of Electors nominated by the successful party in any state is almost certain of election. Hence it is easily possible for a candidate to carry the states having large blocks of Electors and thus secure a majority in the Electoral College, without at the same time winning a majority of the total popular vote. That this has actually happened on numerous occasions is indicated by the following table:

MINORITY PRESIDENTS

Year	Name	Popular Vote	Per Cent	Electoral Vote	Per Cent
1824 <sup>1</sup>	Jackson (Republican).....	152,901	42%	99	38%
	Adams (Republican).....	114,023	32%	84	32%
	Crawford (Republican).....	46,979	13%	41	16%
	Clay (Republican).....	47,217	13%	37	14%
1844 <sup>2</sup>	Polk (Democrat).....	1,337,243	49%	170	62%
	Clay (Whig).....	1,299,062	48%	105	38%
	Birney (Liberty).....	62,300	3%	0	0
1848 <sup>2</sup>	Taylor (Whig).....	1,360,099	47%	163	56%
	Cass (Democrat).....	1,220,544	42%	127	44%
	Van Buren (Free Soil).....	291,263	11%	0	0
1856 <sup>2</sup>	Buchanan (Democrat).....	1,838,169	45%	174	59%
	Fremont (Republican).....	1,341,264	33%	114	38%
	Fillmore (American).....	874,534	22%	8	3%
1860 <sup>2</sup>	Lincoln (Republican).....	1,866,452	40%	180	60%
	Douglas (Democrat).....	1,376,957	29%	12	4%
	Breckinridge (Democrat).....	849,781	18%	72	24%
	Bell (Constitutional Union)...	588,879	13%	39	12%
1876 <sup>3</sup>	Hayes (Republican).....	4,033,768	48%	185	50.2%
	Tilden (Democrat).....	4,285,992	51%	184	49.8%
	Cooper (Greenback).....	81,737	.9%	0	0
	Smith (Prohibition).....	9,522	.1%	0	0

<sup>1</sup> Incomplete figures, 6 states having legislative election of Electors (Del., Ga., La., N. Y., S. C., Vt.). Adams was elected by the House.

<sup>2</sup> Incomplete, South Carolina having legislative election.

<sup>3</sup> The accuracy of the popular vote for Hayes and Tilden was disputed. Since Hayes was declared elected, the Republican figures are accepted, the Democratic figures not being substantially different.

1880	Garfield (Republican).....	4,454,416	48.3%	214	58%
	Hancock (Democrat).....	4,444,952	48.2%	155	42%
	Weaver (Greenback).....	308,578	3.4%	0	0
	Dow (Prohibition).....	10,305	.1%	0	0
1884	Cleveland (Democrat).....	4,874,986	48.5%	219	55%
	Blaine (Republican).....	4,851,981	48.2%	182	45%
	Butler (Greenback).....	175,370	.2%	0	0
	St. John (Prohibition).....	150,369	.1%	0	0
1888	Harrison (Republican).....	5,439,853	48%	233	58%
	Cleveland (Democrat).....	5,540,329	49%	168	42%
	Fisk (Prohibition).....	249,506	2%	0	0
	Streeter (Union Labor).....	146,935	1%	0	0
1892	Cleveland (Democrat).....	5,556,543	46%	277	62%
	Harrison (Republican).....	5,175,582	43%	145	33%
	Weaver (Populist).....	1,040,886	8.6%	22	5%
	Bidwell (Prohibition).....	255,841	2%	0	0
	Wing (Socialist Labor).....	21,532	.4%	0	0
1912	Wilson (Democrat).....	6,293,019	42%	435	82%
	Roosevelt (Progressive).....	4,119,507	27.2%	88	16%
	Taft (Republican).....	3,484,956	23.2%	8	2%
	Chafin (Prohibition).....	207,828	1.4%	0	0
	Debs (Socialist).....	901,873	6%	0	0
	Reimer (Socialist Labor).....	29,259	.2%	0	0
1916	Wilson (Democrat).....	9,129,269	49%	277	52%
	Hughes (Republican).....	8,547,323	46%	254	48%
	Benson (Socialist).....	590,579	3.2%	0	0
	Hanly (Prohibition).....	221,329	1.2%	0	0
	Reimer (Socialist Labor).....	14,180	.1%	0	0

## 29. CALL FOR THE NATIONAL CONVENTION

The Constitution makes no provision for the nomination of presidential candidates, nor is there yet (1928) any law of Congress dealing with that subject. Beginning in 1800, the party members in Congress assumed the function of recommending candidates for their respective parties, but by 1824 this Congressional Caucus, as it was called, had fallen into disrepute and was abandoned. The system of delegate conventions had already been used to some extent in the states, it was used by the Anti-Masonic party in 1831 for the nomination of its presidential candidates, was soon adopted similarly by all parties, and has since become a fixed part of our political machinery. The methods of composing such national nominating conventions are indicated by the following documents.

### a. Call for Republican Convention, 1924

[*Official Proceedings, Republican National Convention, 1924*, pp. 10-15.]

*To the Republican Voters of the United States:*

In pursuance of the rules adopted by the Republican National Convention of 1920, the Republican National Committee directs

that a National Convention of delegated representatives of the Republican Party be held in the City of Cleveland, in the State of Ohio, at eleven o'clock, a.m., on Tuesday, the 10th day of June, 1924, for the purpose of nominating candidates for President and Vice-President, to be voted for at the Presidential Election on Tuesday, November 4, 1924, and for the transaction of such other business as may properly come before it.

The voters of the several States and of Alaska, Hawaii, Porto Rico, the Philippine Islands and the District of Columbia, who are in accord with the principles of the Republican Party, believe in its declaration of policies, and are in sympathy with its aims and purposes, are cordially invited to unite under this call in the selection of Delegates to said Convention.

Said National Convention shall consist of

#### (a) DELEGATES AT LARGE

1. Four Delegates-at-Large from each State.
2. Two additional Delegates-at-Large for each Representative-at-large in Congress from each State.
3. Two Delegates-at-Large each for Alaska, District of Columbia, Porto Rico, Hawaii, and the Philippine Islands.
4. Three additional Delegates-at-Large from each State casting its electoral vote, or a majority thereof, for the Republican nominee for President in the last preceding Presidential election.

#### (b) DISTRICT DELEGATES

1. One District Delegate from each Congressional District.
2. One additional District Delegate from each Congressional District casting 10,000 votes or more for any Republican elector in the last preceding Presidential election or for the Republican nominee for Congress in the last preceding Congressional election.

#### (c) ALTERNATE DELEGATES

One Alternate Delegate to each Delegate to the National Convention.

#### DELEGATES SHALL BE ELECTED UNDER THE FOLLOWING RULES:

FIRST: Only legal and qualified voters shall participate in a Republican primary, caucus, mass meeting, or mass convention, held for the purpose of selecting delegates to be elected as dele-

gates to County, District or State Conventions, and only such legal and qualified voters shall be elected as delegates to County, District and State Conventions.

SECOND: State and District Conventions shall be composed of delegates who are legal and qualified voters. Such delegates shall be apportioned among the counties, parishes and cities of the State or District, having regard to the Republican vote therein.

THIRD: Delegates and Alternates to the National Convention shall be duly qualified voters of their respective States and Territories, and in the case of the District of Columbia, residents therein.

Delegates-at-Large and their Alternates, and Delegates from Congressional Districts and their Alternates, shall be elected in the following manner:

(1) By primary election, in accordance with the laws of the State in which the election occurs, in such States as require by law the election of Delegates to National Convention of political parties by direct primaries; provided, that in any State in which Republican representation upon the board of judges or inspectors of elections for such primary election is denied by law, Delegates and Alternates shall be elected as hereinafter provided.

(2) By Congressional or State Conventions, as the case may be, to be called by the Congressional or State Committees, respectively. Notice of the call for any such convention shall be published in a newspaper or newspapers of general circulation in the District or State, as the case may be, not less than fifteen days prior to date of said Convention.

(3) Provided, however, that in selecting Delegates and Alternates to the National Convention, no State law shall be observed which hinders, abridges or denies to any citizen of the United States eligible under the United States Constitution to the office of President or Vice-President the right or privilege of being a candidate under such state law for the nomination for President or Vice-President; or which authorizes the election of a number of Delegates or Alternates from any State to the National Convention different from that fixed in this call.

In a Congressional District where there is no Republican Congressional Committee, the Republican State Committee shall issue the call and make said publication.

All Delegates from any State may, however, be chosen from the State at large, in the event that the laws of the State in which the election occurs so provide.



Alternate Delegates shall be elected to said National Convention for each unit of representation equal in number to the number of Delegates elected therein and shall be chosen in the same manner and at the same time the Delegates are chosen; provided, however, that if the law of any State shall prescribe the method of choosing Alternates, they shall be chosen in accordance with the provisions of the law of the State in which the election occurs.

The election of Delegates and Alternates from Alaska, Hawaii, Porto Rico, the Philippine Islands and the District of Columbia, shall be held under the direction of the respective recognized Republican Central Committee or governing committee therein, in conformity with the resolution this date adopted by the National Committee, copies of which resolution will be furnished to the governing committee of the Republican Party in each of such units of representation by the Secretary of the National Committee.

All Delegates or Alternates shall be elected not earlier than thirty days after the date of this call and not later than thirty days before the date of the meeting of said Republican National Convention unless otherwise provided by the laws of the State in which the election occurs.

No Delegates or Alternates shall be deemed eligible to participate in any convention to elect Delegates to said National Convention who were elected prior to the date of this call.

The credentials of each Delegate and Alternate elected must be forwarded to the Secretary of the Republican National Committee at the office of the National Committee, Munsey Building, Washington, D. C., at least twenty days before the said 10th day of June, 1924, for use in making up the temporary roll of the Convention; except in the case of Delegates or Alternates elected at a time or times in accordance with the laws of the State in which the election occurs, rendering impossible the filing of credentials within the time above specified.

All notices of contests shall be forwarded in the same manner and within the same time limit. When more than the authorized number of Delegates or Alternates from any State, Territory or Territorial possession are reported to the Secretary of the National Committee, a contest shall be deemed to exist and the Secretary shall notify the several claimants so reported and shall submit all such credentials and claims to the whole Committee for decision as to which claimants reported shall be placed on the temporary roll of the Convention; provided, however, that

the names of Delegates and Alternates presenting certificates of election from the canvassing board or officer created or designated by the law of the State in which the election occurs, to canvass the returns and issue certificates of election to Delegates to National Conventions of political parties in a primary election, shall be placed upon the temporary roll of the Convention by the National Committee.

All notices of contests shall be submitted in writing, accompanied by a printed statement setting forth the ground of the contests, and must be filed with the Secretary of the National Committee at least twenty days prior to the meeting of the National Convention, except in the case of Delegates or Alternates elected at a time or times in accordance with the laws of the State in which the election occurs, rendering impossible the filing of notices of contests within the time above specified.

The Secretary of the Republican National Committee is directed to promulgate this call by sending a copy thereof to the member of the National Committee from each State, Territory, Territorial Possession and the District of Columbia, and to inclose therewith copies of the call for the Chairman and Secretary of the State Central Committee or governing committee of the party therein to be forwarded to said Chairman and Secretary by the member of the National Committee.

[Here follows the apportionment of delegates to the various states and territories]. . . .

JOHN T. ADAMS,  
Chairman.

GEORGE B. LOCKWOOD,  
Secretary.

Washington, D. C.,  
December 12, 1923.

#### b. Call for Democratic Convention, 1924

[*Official Proceedings, Democratic National Convention, 1924*, pp. 4-5.]

WASHINGTON, D. C., January 24, 1924.

To Whom It May Concern:

By authority of the Democratic National Committee, a National Convention of the Democratic Party is hereby called, to meet in the City of New York, in the State of New York, on the 24th day of June, 1924, at 12 o'clock noon, for the purpose of

nominating a candidate for President and a candidate for Vice-President of the United States, to promulgate a Party platform, and to take such other action as may be deemed advisable. Delegates and alternates from each State shall be chosen to the number of two delegates and two alternates for each United States Senator and two delegates and two alternates for each Representative in Congress from the respective States; and the District of Columbia, the Philippines, Hawaii, Porto Rico, Alaska, and the Canal Zone shall be entitled to six delegates and six alternates each.

In accordance with the action taken by the Democratic National Committee in authorizing the issuance of this call, it is provided that no state, territory or district shall elect any number of delegates with their alternates in excess of the quota to which such state, territory or district may be entitled under the basis of representation herein indicated.

In authorizing this call the Democratic National Committee further provided that in order that opportunity may be afforded the various states to give adequate representation to women as delegates-at-large, without disturbing prevailing party custom, there may be elected from each state four delegates at large for each Senator in Congress from such state, with one-half vote each in the National Convention, and recommended to the states that one-half of the number of delegates at large shall be women.

(Signed) CORDELL HULL, Chairman.

### 30. PRESIDENTIAL PRIMARY

Until 1912, the delegates to the national conventions were chosen by state or district conventions, and thus the representation of the voter was only indirect. Beginning with the campaign of 1912, a number of states have provided for the direct election within each party of delegates to the national convention, or for direct popular preference on presidential candidates, or for both. The purpose of such a presidential primary, as it is called, is clearly to permit the voters of each party to have a more direct voice in the selection of the presidential candidate; but the failure of some states to adopt the system, as well as other considerations in its operation, have prevented its complete success in that respect.

#### a. Presidential Primary Law of Oregon, 1915

[*Oregon Laws 1920*, vol. II, pp. 1771-1775.]

§ 3936. Any registered elector may become a candidate for his or her party's nomination for any office to which he or she is

constitutionally eligible or for selection as national committeeman, delegate to a national party convention or presidential elector, in addition to the method now provided by law, by filing a declaration of his or her candidacy, as herein provided and accompanying said declaration with the required filing fee. Declarations of candidates shall be filed with the secretary of state, county clerk or city clerk or auditor, as the case may be, and the filing of a declaration with the proper official shall be conclusive evidence that the elector in question is a candidate for nomination by his party or for selection as national committeeman, delegate to a national party convention or presidential elector. . . .

§ 3938. Declarations of candidates for delegates to national party conventions shall be substantially as follows:

To \_\_\_\_\_,  
Secretary of State.

I, \_\_\_\_\_, reside at \_\_\_\_\_, and my postoffice address is \_\_\_\_\_, I am a duly registered member of the \_\_\_\_\_ party. If I am selected as delegate to the national \_\_\_\_\_ convention to be held at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, I will use my best efforts to bring about the nomination of those persons for president and vice-president of the United States, who receive the largest number of votes at the coming primary election in the state of Oregon.

I believe (here the candidate, in not exceeding one hundred words, may state the names of candidates or principles in which he especially believes, and the twelve words, or less, which he desires printed on the ballot.)

I inclose (check, draft, money order, or cash, as the case may be) in the sum of \$\_\_\_\_\_ to cover the filing fee required by law.

\_\_\_\_\_, (Signature of Candidate.)

§ 3945. In the years when a president and vice-president of the United States are to be nominated and elected, the several political parties recognized by section 3965 shall elect delegates to their national conventions and nominate their candidates for presidential electors, and may express their choice for candidates for the nominations for president and for vice-president of the United States in the manner hereinafter provided.

§ 3946. As soon as possible after the national committees of the several political parties issue their official calls for national

nominating conventions, the secretary of state shall ascertain from the proper officials of such committees, the number of delegates allotted by such committees to the state of Oregon. Of the number of delegates allotted to Oregon by the national committee of each party subject to this act two of such delegates shall be elected from each congressional district of the state, and the remainder shall be elected from the state at large. In the arrangement of the official ballots for the primary nominating election of each party, the secretary of state shall provide for the election of two delegates from each congressional district in the state of Oregon, and for the election of the remainder of the said allotted delegates at large from the state of Oregon to the national convention of such political parties.

§ 3947. Every qualified elector of a political party within the meaning of this act shall have the right to vote his or her preference on the nominating ballot of his or her party for two delegates from the congressional district in which he or she may reside and also for as many delegates as are to be elected at large from the state of Oregon. A plurality vote shall be deemed sufficient to elect a delegate to any national convention; provided, the allotted number of candidates receiving the highest number of votes shall be chosen in each congressional district and in the state at large.

§ 3949. Candidates for the office of delegate to a national convention or for nomination for the office of presidential elector may have their names placed on the official ballots for the primary nominating election of their respective political parties in the manner that candidates for nomination for other state and district offices are placed thereon as provided by law; provided, that whenever a nominating petition is a prerequisite for the appearance of a candidate's name on the nominating ballot of his or her party, existing laws providing the manner in which the names of candidates for nomination for state and district offices may be printed on the nominating official ballots, shall govern, provided not more than five hundred signatures shall be required on any such petition.

§ 3950. Candidates for the office of delegate to a national convention and for nomination for the office of presidential elector shall have the right to use one page of space in the official primary election campaign pamphlet of their respective political parties which may be published and distributed prior to a primary nominating election upon the payment to the secretary of

state of fifty dollars therefor. Any candidate may have not to exceed three additional pages of space in said pamphlet upon the payment of one hundred dollars for each additional page so used.

§ 3951. When candidates for the offices of president and vice-president of the United States are to be nominated, every qualified elector of a political party subject to this law shall have opportunity to vote his or her preference, on his or her party nominating ballot, for his or her choice for one person to be the candidate for nomination by his or her political party for the office of president, and one person for vice-president of the United States, either by writing the names of such persons in blank spaces to be left on said ballot for that purpose, or by marking with a cross before the printed names of the persons of his or her choice, as in the case of nominations of candidates for state and district offices. The name of any candidate for a party nomination for president or for vice-president of the United States shall be printed on said ballots upon the written request of such candidate filed with the secretary of state within the time provided for the filing of petitions of candidates for nomination for state and district offices, or upon the petition of one thousand of his supporters who are registered voters in the state of Oregon of the political party to which said candidate belongs. The names of such candidates for party nominations for president and vice-president of the United States shall be printed on the official ballots for the primary nominating elections of their respective political parties, and shall be marked, counted, canvassed, returned and proclaimed in the same manner and under the same conditions, as far as the same are applicable, as the names of candidates for nomination for state and district offices.

§ 3952. Candidates for party nominations for president and for vice-president of the United States, or the committee or organization which shall file a petition in behalf of any such candidate, shall have the right to use not more than four pages of space in the official campaign pamphlet of their respective political parties and they shall pay to the secretary of state one hundred dollars per page for each page of space so used. Any qualified elector who is opposed to the nomination of a candidate of the political party to which he or she may belong, may have not exceeding four pages in the official pamphlet of his or her party in which he or she may set forth objections to such candidate and shall pay for space therein at the same rate.

§ 3953. Every person regularly nominated by a political party recognized as such by the laws of Oregon, for president or for vice-president of the United States, or for any office to be voted for by the electors of the state at large or for senator or representative in congress, or for any other office to be voted for in the state at large, shall be entitled to use not to exceed four pages of space in the state campaign book provided for by section 4119. In this space, a candidate, or his supporters with his written permission, filed with the secretary of state, may set forth the reasons why he should be elected. No charge shall be made against candidates for president and for vice-president of the United States for this printed space. The other candidates above named shall pay at the rate of one hundred dollars per printed page for said space, and said payment shall not be counted as a part of the 10 per cent of one year's salary that each candidate is allowed to spend for campaign purposes.

#### b. Presidential Primary Law of Massachusetts

[*General Laws of Massachusetts, 1921*, vol. I, pp. 447-449.]

##### CHAP. 53. Provisions Applying to Presidential Primaries.

SECTION 66. In any year in which candidates for presidential electors are to be elected, the election of delegates and of alternate delegates to national conventions of political parties shall be by direct plurality vote in primaries. The number of district delegates and the number of district alternate delegates, not less than one from each congressional district, and the number of delegates and alternate delegates at large, shall be fixed by the state committee, who shall give notice thereof to the state secretary on or before the third Wednesday in March. . . .

SECTION 68. The state secretary shall cause to be placed on the official ballot for use in primaries at which delegates to national conventions of political parties are elected, under separate headings, and in the following order, the names of candidates for delegates at large, alternate delegates at large, district delegates, and alternate district delegates. The names of candidates appearing in nomination papers containing nominations for all the places to be filled shall be placed first on said ballot, arranged in groups and in the same order as in the nomination papers. The order in which the groups shall appear shall be determined by lot in the manner provided in section thirty-four. The names of candidates appearing in nomination papers containing nomina-

tions for less than all the places to be filled shall follow, alphabetically arranged. The ballot shall also contain a statement of the preference, if any, of each candidate for delegate as to a candidate for nomination for president, provided that such statement appears in his nomination papers; but no such statement of preference by any candidate for delegate shall appear upon the ballot unless such candidate for nomination for president files his written assent thereto with the state secretary on or before five o'clock in the afternoon of the last day for filing nomination papers. Such assent may be communicated by telegraph. Upon the receipt of the records of votes cast at presidential primaries, the city or town clerk shall forthwith canvass the same and make return thereof to the state secretary, who shall forthwith canvass such returns, determine the results thereof, and notify the successful candidates.

SECTION 69. In case of the death, withdrawal or ineligibility of a candidate for delegate to a national convention, the vacancy may be filled in any manner which is clearly provided for on the nomination paper placing such candidate in nomination, before the signature of any voter is entered thereon, otherwise the remaining candidate or candidates nominated by the same nomination paper may fill the vacancy. In case of a withdrawal, such vacancy must be filled by filing in the office of the state secretary, within seventy-two week-day hours succeeding five o'clock in the afternoon of the last day for filing withdrawals, a statement signed by the person or persons authorized to fill the vacancy, giving the name and residence of the candidate nominated, accompanied by his written acceptance.

SECTION 70. The provisions of law relating to primaries consistent with the three preceding sections shall apply to presidential primaries so far as practicable.

### 31. CONDUCT OF THE NATIONAL CONVENTION

The national conventions operate under strict rules of procedure, adopted for each convention. These rules usually follow very closely the rules of procedure in the House of Representatives, but some are unique, such as the traditional two-thirds and unit rules of Democratic conventions. Tense and dramatic situations are numerous, and at times the delegates conduct themselves as a mob, rather than as accredited representatives engaged in the serious business of naming presidential candidates.

#### a. Democratic Rules of Procedure

[*Official Proceedings, Democratic National Convention, 1924*, pp. 91-92; *ibid.*, 1920, p. 85.]



*Resolved*, That the rules of the last Democratic National Convention, including the two-thirds rule for the nomination of candidates for the office of President and Vice-President, and including the rules of the House of Representatives of the Sixty-fifth Congress, so far as applicable, be the rules of this Convention: Provided, That no delegate shall occupy the floor in debate for more than thirty minutes, except by unanimous consent of the Convention.

The order of business which your Committee recommends is as follows:

1. Report of the Committee on Credentials.
2. Report of the Committee on Permanent Organization.
3. Ratification of list of members of the Democratic National Committee: Provided, That all contests as to membership of the National Committee shall be referred to the incoming National Committee with full power to decide such contests.
4. Presentation of candidates for President of the United States.
5. Report of the Committee on Platform and Resolutions.
6. Selection of a candidate for President of the United States.
7. Presentation and selection of a candidate for Vice-President of the United States.
8. Motions.
9. Resolutions.
10. Adjournment.

*Resolved*, further, That all seconding speeches shall be limited to five minutes.

*Resolved*, That in casting votes on the call of the states, the Chair shall recognize and enforce a unit rule enacted by a state convention, except in such states as have by mandatory statute provided for the nomination and election of delegates and alternates to national political conventions in congressional districts and have not subjected delegates so selected to the authority of the state committee or convention of the party, in which case no such rule shall be held to apply.

#### b. Speech Nominating Governor Lowden, 1920

[*Official Proceedings, Republican National Convention, 1920*, pp. 126-129.]

THE PERMANENT CHAIRMAN.—The Secretary will continue calling the roll for further nominations for the office of President.

A READING CLERK (MR. WILL A. WAITE, of Michigan).—Arkansas—

MR. H. L. REMMEL, of Arkansas.—Arkansas yields to Illinois. (Applause.)

THE PERMANENT CHAIRMAN.—Has Illinois a candidate to present to the Convention?

MR. FRANK L. SMITH, of Illinois.—Representative Rodenberg is now on his way to the platform.

At this moment Representative Rodenberg advances to the front of the platform and is greeted with vociferous applause.

THE PERMANENT CHAIRMAN.—The chair presents Representative William A. Rodenberg of Illinois to present the name of Governor Lowden. (Great applause.) The Convention will please be in order and listen to Representative Rodenberg.

#### MR. RODENBERG NOMINATING GOVERNOR LOWDEN

MR. WILLIAM A. RODENBERG, of Illinois.—Mr. Chairman, Delegates to the National Republican Convention, Ladies and Gentlemen: I desire to thank my friend from Arkansas for his courtesy in yielding to the State of Illinois, and I wish to assure him and his fellow delegates that his kindness is appreciated by the delegation to which I have the honor to belong. (Applause from the Illinois delegation.)

At no time since the birth of the Republican party has there been greater need for the exercise of calm, deliberate and dispassionate judgment in the selection of a standard bearer than there is today. A spirit of rebellious unrest is abroad in the land. On all sides are heard murmurings of discontent. The times are pregnant with the prophecy of gloom and despair. Confidence has disappeared and the splendid optimism of former days, once our proudest national asset, has given way to an ever present fear of impending disaster.

For seven years the ship of state, straining in every timber, has been drifting in a sea of uncertainty, its pilot confused and bewildered by strange voices in the air and lured on in its vacillating course by false lights along the shore. Nine anxious months still lie before us, and if, perchance, it should be our good fortune to avoid the rocks of destruction it will be due solely to the mysterious workings of a merciful Providence that guides and protects the destiny of a chosen people in their time of trial and tribulation. (Applause.)

I know that I voice the sentiment of every patriotic American

when I express the hope that God will speed the day when a better and braver pilot shall be placed at the helm—one who is ready and willing in times of stress and storm to read the chart and compass of experience; one who can restore discipline among officers and crew and inspire the courage that is born of confidence; one who will steer a straight and steady course through the troubled waters of national disorder and again find refuge in the harbor of national safety and security. To find such a pilot is the imperative duty of the Republicans assembled in convention today. (Applause.)

My friends, three score years ago, at a time when the passions of men were stirred to the depths, when the horizon of the republic's future was darkened by the clouds of approaching conflict, when the very perpetuity of "government of the people, by the people, and for the people" was trembling in the balance, the nation turned for leadership to the state of Illinois. (Applause.) Here, on the broad and fertile prairies of this great state, so open that truth could find no hiding place, was found a man of the people, a leader of leaders, the apotheosis of freedom's holy light, our Lincoln, the world's Lincoln. (Applause.) Grandly, nobly, sublimely he met the test. Patiently he pressed forward in the great task that lay before him and today he stands acclaimed as America's grandest contribution to the world's heritage of great and noble men. (Applause.)

Illinois, the State whose soil has been sanctified by the blood of the immortal Lovejoy, our first great martyr to the cause of free press and speech, gave Abraham Lincoln to the nation in 1860, and Illinois, the State that is still the wellspring of Republican hope and inspiration, stands ready in 1920 to consecrate to the service of the republic another of her great sons—one, whose brilliant record of public and private achievements is the very best and surest guaranty that under his leadership our beloved country will be raised from the obloquy into which it has fallen and again placed on the road that leads to national honor and national glory. (Applause.)

We present him to you because we believe in his rugged Americanism, the Americanism that comes from the close contact with the plain people. Born of humble parentage in the State of Minnesota, his early youth and young manhood were spent on a farm in the State of Iowa. It was there, close to nature and nature's God, the great school of human experience, the school that has given to the nation its best and truest men, that he

formed those sterling traits of character that have ruled his life and have left their impress upon his every act. (Applause.)

We present him to you because we know him to be a manly man of courage and conviction, endowed with the genius of common sense, faithful and fearless, whose every heart beat is in full sympathy with the noblest aspirations of his fellowmen. (Applause.)

We present him to you because he stands for law and order and constitutional government. Of fine legal mind and training, with both legislative and executive experience, he believes in re-establishing the powers and prerogatives of every branch of a federal government as set forth by the fathers in the constitution itself and he is unalterably opposed to executive usurpation of any legislative or judicial function. (Applause.)

We present him to you because his records demonstrate that he has a clear and comprehensive conception of the proper relations of capital and labor to each other. His work as member of Congress and as governor of a great industrial State, with all its complex and diversified interests, stamps him as the living embodiment of the doctrine of the "square deal." He believes in the interdependence of employe and employer and in all of his official acts he has accorded to each exactly the same measure of protection under the law. (Applause.)

We present him to you because he typifies more than any one of the distinguished gentlemen who will be placed in nomination before this Convention the great, vital issue of economy in the administration of public affairs. He believes in the application of sound and practical business principles to the conduct of government and as proof of that belief we point to the decreased tax rate and the increased administrative efficiency of the state over whose destinies he presides today. (Applause.)

We present him to you because he is in full accord with the true spirit of America which still prefers the nationalism of Theodore Roosevelt to the internationalism of Woodrow Wilson. He believes that the sovereignty of the United States must be kept free and inviolate from European influence or dictation and that, while maintaining a friendly attitude toward all nations, we owe it to those who have gone before and to those who are to follow us to enter into partnership with none. (Applause.)

We present him to you because to him the American flag, whose stars and stripes have been baptized in the best blood of American patriotism, symbolizes the strength and the power and the majesty of a mighty nation and he believes that that flag should

command respect at home and abroad and give full and ample protection to the humblest American citizen, wherever it may be unfurled to the breeze. (Applause.)

Delegates, a solemn responsibility rests upon the Republican party today. Many difficult and perplexing problems, social, economic and industrial, growing out of the world war are pressing for solution. The best constructive ability of our great constructive party must be utilized in the solution of these problems. In the crucial and critical period upon which we have now entered the nation demands as its chief executive a man of clear brain and steady nerve, a man of visions but not a visionary, a man of ideals but not an idealist, a man of works and not of words. (Applause.)

Illinois has such a man.

We present him to you as our candidate for President.

We present the patriotic governor of a patriotic State, Frank Orren Lowden.

Representative Rodenberg concluded his speech at 11:34 a.m., and as he uttered the words "Frank Orren Lowden" there was a tremendous outburst of applause. A member of the Illinois delegation grabbed the Illinois standard and started around the hall, other members of the delegation carrying flags and pictures of Lowden, and in their train came the delegates from Iowa, Kentucky, Virginia, Connecticut, Oklahoma, carrying the State's standards. Hundreds of pictures of Lowden, large and small, were carried by members of the several delegations. The Kentucky delegation carried a banner bearing the words "Every traveling man wants a business man for President—Lowden." As the delegates marched around the hall they chanted "Lowden, Lowden, Frank O. Lowden."

THE PRESIDING OFFICER (MR. ALBERT J. BEVERIDGE, of Indiana) rapped for order at 12:15 p.m. but was met by an increased volume of cheering and cries "Lowden, Lowden, Frank O. Lowden." Order was finally restored at 12:20 p.m., the demonstration having continued for 46 minutes.

### c. Demonstrations in Democratic Convention, 1924

[Accounts in *N. Y. Times*, reprinted in *Literary Digest*, July 12, 1924.]

Inside, sitting nearly in the center of the New York delegation, with a large megaphone handy, James J. Hoey, one of the chief lieutenants in the Smith campaign, arose occasionally before the

proceedings began and scanned what might be termed the horizon. Once or twice he spoke to a more agile-appearing individual, who hurried away.

More people who gathered about the doors earlier, some hundreds across the streets that surround the Garden, congestion in the aisles a little more noticeable—these were the outward the visible signs of something about to happen.

Very few persons indeed knew just what would happen. The delegates from far-away States and delegates pledged, and willingly, to other candidates were all talking of the coming Smith demonstration as they found their ways slowly to their seats.

From the start there was much whispered conferring in the New York delegation. And here and there about the hall, on the floor among the delegates, as well as in the galleries, were noise-making machines, attached to boards. They were of the sort that give out a sound rather closely resembling the prolonged shouting of a great crowd. Some of them were carefully covered with coats.

To one who passed from delegation to delegation on the floor, as Mr. Roosevelt was speaking, it was clear that the former Vice-Presidential candidate was a favorite and that he was being listened to with much more attention than is accorded to most convention speakers.

Now and then, as applause for some point in the speech led some overanxious booster to make a false start on the work he was designated to do, there was a giggle among the delegates. If the noise was even slightly prolonged, Mr. Hoey got up and signaled with both hands and the noise stopt. With his arms he had much better control of the convention, above the floor, than Senator Walsh with his gavel.

Several printed copies of Mr. Roosevelt's speech were being read in the New York delegation. As the speaker neared the end, Mr. Hoey looked around the Garden, just as a careful stage manager might before the curtain rose on a first-night performance. The coats were taken from over the noise-making machines. The New York standard was loosened in its socket. William J. Collins, sitting in the place of Charles F. Murphy as delegate, climbed across the knees of two or three delegates and grasped the pole of the standard.

As Mr. Roosevelt finished, Mr. Collins started away from the delegation with the standard, but the other delegates remained seated. The shock battalion of paraders was really made up of outsiders, who literally poured into the place from all the en-

trances, having been held in leash at the doorways until the right moment.

"All set," roared a collarless and sleeveless man in the rear of the first of the east galleries as Franklin D. Roosevelt wound up his speech nominating the Governor.

His corps of helpers put their fingers on the buttons of great brass Fire Department and ambulance sirens, which were attached to cases of dry batteries.

"Go!" he shouted, as Roosevelt named his man.

The fingers preste the buttons. The connection was made. Volcanoes of sound burst forth, shrill, unearthly and horrible. It was a screech of squadrons of charging ambulances and speeding hook-and-ladder trucks, a mingled racket which New Yorkers associate with falling buildings, six-alarm fires, elevated collisions, Black Tom explosions and other great public calamities.

The collarless band in charge of these engines of public opinion stepped back and formed a group near a window looking out on Fourth Avenue. The leader made his hands a megaphone over the ears of his first lieutenant and yelled "Fine." Then they sat down and awaited developments. "Let electricity do it" was their motto.

Men and women in the seats in the immediate path of this rush of sound acted as if they had been blown out of their seats. They leaped to their feet and staggered about, shell-shocked. Altho the Garden was crowded and seats at a premium, scores rushed out and never came back. The great tidal wave of falsetto notes cleared a broad swath through the whole tier and maintained it for an hour and a half.

The comparatively mild and pleasant sounds of fishhorns, cowbells and rattlers were almost swallowed up. If you were 200 feet away from fire and ambulance apparatus, you could hear the nearest two or three bells and mechanical croakers, but the rest was lost. Each of the electrical screamers was worth several hundred throats. There was enough natural shouting and cheering to make one of the greatest demonstrations of its kind, but the great triumph was that of science. The electrical claque had come into its own. New Year's Eve may be turned on hereafter from an electrical socket.

The 100-volt applause was all coming from one part of the Garden and was causing vague suspicions that the Smith followers were in some way improving on nature. A courier came running up, shouted in vain in the ear of the boss of the sirens,

and then wrote out instructions to deploy the artillery. Gangs of men picked up the cases of dry batteries.

Others picked up the whistles and sirens, huge affairs of nickel and brass. A group of corridor-crashers marched ahead of them, clearing the way, and new positions were taken up in order to pour a heavy fire from various angles into the wavering delegates.

Sustained electrically driven tributes for Smith were poured into the pit from three sides of the house. Streaks of empty seats here and there indicated the new positions. Surprized by the sudden rushes of sound, men and women had quit their places to save their ears.

After half an hour another liaison officer dashed up to noise headquarters. He reported a sagging in the demonstration on the north. A reserve siren was hustled over there to plug up the gap, and there was now a well-rounded circle of ear torture.

For a few minutes the squawk of fishhorns and the jangle of cowbells became very distinct on the east. A lull in the big noises had given an opportunity for the little ones. The connection of one of the battery cases had become dislocated. Some quick work was done, and in five minutes the siren was testifying its approbation of Smith again on all twelve batteries.

But the electricians had it easy. They sat back and laughed at relays of men who turned stiff cranks and ground earache out of sirens that worked by compressed air. Large wooden frames had been built to sustain these sirens and they had been adjusted to a cranking mechanism which turned hard. After struggling the great crank round and round for a few minutes, the exhausted laborer had to call for help. Five strong men were completely done out by their work on this machine.

The thirty-two-piece Sutherland Seventh Regiment Band, which dominated the McAdoo demonstration with ease and smothered all previous outbreaks on the floor, could hardly make a note heard over the electrical and compressed air testimonials to Smith.

The thirty-two musicians blew "Rosie O'Grady," "Mamie O'Rourke" and "Annie Rooney" into their horns, but they never came out. They confided in the trombones what they do and say in the Bowery, but these matters never came to the ears of the delegates. "East Side, West Side" was done in pantomime. They blew until their cheeks were inflated to the bursting point, but that was their secret. The crowd thought they were resting.

The thousands of Smith men who packed the galleries played a valuable part in the demonstration because, altho they screamed



themselves hoarse without necessity, they contributed much to the picture by waving flags and Smith banners, showering bits of torn papers and tiny flags into the air and displaying big pictures of Smith.

The Smith demonstration outdid the McAdoo demonstration by ten to one in the battle of noise, but it was like brass knuckles and blackjacks against boxing-gloves. The McAdoo followers did not understand the first principles of noise.

In the meantime, tho, with thoroughness and an entire absence of confusion, the standards of the other States that paraded had been picked up, men and women who were delegates and men and women who were not somehow flocked into the aisles.

The galleries were roaring, the unsympathetic delegates, highly interested, had climbed on their chairs, and at one end of the hall a group of stalwarts had unfurled some two-score banners bearing Governor Smith's picture, an additional band had been brought in from the northeast entrance, tho music could not be heard ten feet away, and the uninitiated might have reached the conclusion that pandemonium was reigning.

The band may be a very good band. It certainly tried hard. It made at least four false starts before Mr. Roosevelt finished his speech. It was anxious to play and later it hated to quit. Mr. Hoey said more than once before the demonstration started:

"Won't some one stop that band!"

Other Tammany men said other things to the same purport. And when the band started out with the parade it never stopt playing. Noise might come and noise might go, but that band was going to play right on. Its members were of the plodding type. Whether they were jammed in between hundreds of yelling men and women so they could not move, or whether they had fifty feet in the clear made not the slightest difference. They went right on playing. Twice the cornetists had to stop, tho. The crowd was so dense they could not get their cornets to their lips. The trombone players craned their necks and resorted to the perpendicular method of operating the trombone, which is poor technique, but produces results nevertheless.

When it was decided that the Smith demonstration had sufficiently outlasted the McAdoo demonstration, couriers arrived at the place where the noise was made and most of it was turned off by pressing two or three buttons and ceasing to turn certain cranks. This gave audibility to the band and to the human demonstration. The lung work was remarkable. The withdrawal of the heavy artillery support left the shouters to their

own resources, and they gave a good account of themselves. Posters and papers were done into megaphones to assist the shouting.

The band, stolidly trudging its long, long trail apparently believed that the day does not end until the sun goes down. It played on and on and on, until Mr. Roosevelt had to cry out from the platform, "Some one stop that band!" But even in the well-organized and thoroughly disciplined hosts of Tammany, few ventured the impossible. They did not stop the band; they led it outside.

#### d. Nomination of Senator Harding, 1920

[*Official Proceedings, Republican National Convention, 1920*, pp. 219-224.]

THE PERMANENT CHAIRMAN.—No candidate having received a majority of the votes in the Convention on this the ninth ballot, there is no nomination. The Secretary will proceed to call the roll of the States, etc., for the tenth ballot.

The Secretary of the Convention having proceeded with and concluded the calling of the roll of States, Territories and Territorial Possessions, the tenth ballot was announced:

Harding,  $692\frac{1}{3}$ ; Wood, 156; Johnson,  $80\frac{4}{5}$ ; Lowden, 11; Hoover,  $9\frac{1}{2}$ ; Coolidge, 5; La Follette, 24; Butler, 2; Lenroot, 1; Hays, 1; Knox, 1; absent,  $\frac{1}{2}$ ; total, 984. [Here follows a tabulation of the tenth ballot.]

The following States when first called announced their choice as shown below, but requested permission to change their votes as shown in the tabulation of the tenth ballot before the result of said ballot had been announced.

Arizona—6 for Wood.

Colorado—6 for Wood, 5 for Harding and 1 for Lowden.

Illinois—17 for Lowden,  $18\frac{4}{5}$  for Johnson, and  $22\frac{1}{5}$  for Harding.

Indiana—20 for Harding and 8 for Wood; 2 absent.

Mississippi— $2\frac{1}{2}$  for Wood and  $9\frac{1}{2}$  for Harding.

New Mexico—6 for Wood.

North Dakota—9 for Harding, 1 for Wood.

Washington—6 for Harding, 5 for Wood, 2 for Poindexter, and 1 for Hoover.

During the balloting the following occurred: . . .

When Pennsylvania was called and the Chairman of the dele-

gation announced 60 of its 76 votes for Harding, the delegates immediately realized that Harding had been nominated. It was then 6:05 o'clock p. m., and, following a volley of applause, the Ohio delegation seized their standard, pictures of Harding and flags, and began a parade around the aisles. Amidst the din of cheering could be heard cries of "Hurrah for the next President," "Hurrah for Ohio," "Hurrah for the Mother of Presidents," but after the Ohio delegation, joined by delegates from other delegations, had encircled the inclosure marking off the delegates, the Chairman began rapping for order. Thereupon the Ohio delegation took the lead in helping to restore order, and at 6:13 o'clock the calling of the roll was resumed.

And at the conclusion of the roll call the following occurred:

MR. HARRY S. NEW, of Indiana.—Mr. Chairman, the two absent delegates from Indiana returned and expressed their choice. The vote of Indiana on this ballot will therefore be, Wood 9, Harding 21. We request that when the ballot is announced that Indiana be so recorded.

A NORTH DAKOTA DELEGATE.—Mr. Chairman, North Dakota desires to change its vote, announced during the roll call, and to cast the unanimous vote of the State, 10, for Senator Harding. (Applause.)

AN ARIZONA DELEGATE.—Mr. Chairman, Arizona desires to change its vote from Wood to Harding. (Applause.)

A WASHINGTON DELEGATE.—Mr. Chairman, the State of Washington now wishes to cast a unanimous ballot for Senator Harding. (Applause.)

A NEW MEXICO DELEGATE.—Mr. Chairman, the New Mexico delegation desires to change its vote and to cast a unanimous ballot for Senator Harding. (Applause.)

A COLORADO DELEGATE.—Mr. Chairman, Colorado wants to change its vote and cast a solid ballot for Senator Harding. (Applause.)

A voice then rang out amidst the din of shouting, "Mr. Chairman, don't let them all get on the band wagon," which was greeted by loud laughter and applause.

MR. FRANK L. SMITH, of Illinois.—Mr. Chairman, Illinois desires to change its vote. Sixteen of the seventeen votes cast for Governor Lowden on the roll call should be changed to Senator Harding. (Applause.)

A MISSISSIPPI DELEGATE.—Mr. Chairman, Mississippi wants to cast its solid ballot for Senator Harding.

THE PERMANENT CHAIRMAN.—The Convention will be in order so that the Secretary may announce the ballot.

Thereupon the ballot was announced as heretofore shown just preceding the tabulation of the vote.

MR. JOSEPH S. FRELINGUYSEN, of New Jersey.—Mr. Chairman, on behalf of the State of New Jersey, I now move that the nomination of Senator Harding be made unanimous.

MR. FRANK L. SMITH, of Illinois.—Mr. Chairman, Illinois seconds that motion.

THE PERMANENT CHAIRMAN.—Ladies and Gentlemen of the Convention, the question is, shall the nomination of Senator Harding be made unanimous? Those in favor of the motion will signify it by saying aye. (A loud chorus of ayes.) Those opposed will signify it by saying no. (A few noes apparently from the Wisconsin delegation, greeted by a storm of hisses from other delegates and the galleries.) The Chair declares Senator Warren G. Harding of Ohio unanimously nominated for President. (Applause, loud and prolonged.)

## CHAPTER VI

### THE PRESIDENT: POWERS AND FUNCTIONS

#### 32. POWER OF PATRONAGE

The President's power of appointment is among his most important powers, and has grown enormously with the expansion of governmental activities and the creation of additional offices. The power to dispense this "patronage", as it is called, gives the President the opportunity, within certain limits, to build up a smoothly working administrative machine which will carry out his policies, to strengthen himself politically throughout the country, and to use as a means of assuring congressional support for his policies. In view of the immense number of appointments that the President must make, it is obvious that he cannot possibly be personally familiar with all the candidates for such appointments or their qualifications, and must rely largely upon recommendations. Hence the practice has developed that appointments to federal office in any state shall be made only after consultation with the Senators or Representatives from that state, who are of the President's party. If there are no members of Congress of that party, the recommendations will usually be made by the leaders of the party organization in the state concerned. These persons, rather than the President, become therefore most frequently the actual patronage dispensers.

##### a. President Lincoln's Use of Patronage

[Dana, *Recollections of the Civil War*, pp. 174-177; reprinted in Beard, *American Government and Politics* (4th ed., The Macmillan Company), pp. 215-216.]

Lincoln was a supreme politician. He understood politics because he understood human nature. I had an illustration of this in the spring of 1864. The administration had decided that the Constitution of the United States should be amended so that slavery should be prohibited. This was not only a change in our national policy, but it was also a most important military measure. It was intended not merely as a means of abolishing slavery forever, but as a means of affecting the judgment and the feelings and the anticipations of those in rebellion. It was believed that such an amendment to the Constitution would be equivalent to new armies in the field, that it would be worth at least a million men, that it would be an intellectual army that would tend to paralyze the enemy and break the continuity of his ideas.

In order thus to amend the Constitution, it was necessary first to have the proposed amendment approved by three fourths of the states. When that question came to be considered, the issue was seen to be so close that one state more was necessary. The state of Nevada was organized and admitted into the Union to answer that purpose. I have sometimes heard people complain of Nevada as superfluous and petty, not big enough to be a state; but when I hear that complaint, I always hear Abraham Lincoln saying, "It is easier to admit Nevada than to raise another million of soldiers."

In March, 1864, the question of allowing Nevada to form a state government finally came up in the House of Representatives. There was strong opposition to it. For a long time beforehand the question had been canvassed anxiously. At last, late one afternoon, the President came into my office, in the third story of the War Department. . . .

"Dana," he said, "I am very anxious about this vote. It has got to be taken next week. The time is very short. It is going to be a great deal closer than I wish it was."

"There are plenty of Democrats who will vote for it," I replied. "There is James E. English, of Connecticut; I think he is sure, isn't he?"

"Oh, yes; he is sure on the merits of the question."

"Then," said I, "there's 'Sunset' Cox, of Ohio. How is he?"

"He is sure and fearless. But there are some others that I am not clear about. There are three that you can deal with better than anybody else, perhaps, as you know them all. I wish you would send for them."

He told me who they were; it is not necessary to repeat the names here. One man was from New Jersey and two from New York.

"What will they be likely to want?" I asked.

"I don't know," said the President; "I don't know. It makes no difference, though, what they want. Here is the alternative: that we carry this vote, or be compelled to raise another million, and I don't know how many more, men, and fight no one knows how long. It is a question of three votes or new armies."

"Well, sir," said I, "what shall I say to these gentlemen?"

"I don't know," said he; "but whatever promise you make to them I will perform."

I sent for the men and saw them one by one. I found that they were afraid of their party. They said that some fellows in the party would be down on them. Two of them wanted in-

ternal revenue collector's appointments. "You shall have it," I said. Another one wanted a very important appointment about the custom house of New York. I knew the man well whom he wanted to have appointed. He was a Republican, though the congressman was a Democrat. I had served with him in the Republican county committee of New York. The office was worth perhaps \$20,000 a year. When the congressman stated the case, I asked him, "Do you want that?"

"Yes," said he.

"Well," I answered, "you shall have it."

"I understand, of course," said he, "that you are not saying this on your own authority?"

"Oh, no," said I; "I am saying it on the authority of the President."

Well, these men voted that Nevada be allowed to frame a state government, and thus they helped secure the vote which was required. The next October, the President signed the proclamation admitting the state. In the February following, Nevada was one of the states which ratified the Thirteenth Amendment by which slavery was abolished by constitutional prohibition in all of the United States.

#### b. Method of Handling Patronage under President McKinley

[Croly, *Marcus Alonzo Hanna: His Life and Work* (The Macmillan Company), pp. 296-298.]

Seldom has any administration after three years in office commanded such united support from its party as in the beginning of 1900 did the administration of Mr. McKinley. Much of the credit of this result belongs to the diplomacy with which the President handled the Republican leaders in and out of Congress. He had the gift of refusing requests without incurring enmity, of smoothing over disagreements, of conciliating his opponents, of retaining his friends without necessarily doing too much for them, of overlooking his own personal grievances and of steering the virtuous middle path between the extremes and eccentricities of party opinion. But decisive as was the President's contribution to the popularity of his administration, Mr. Hanna also deserves a certain share of the credit. More than any other single man, with the exception of the President himself, Mr. Hanna was responsible for the operation of that most vital of party functions, the distribution of patronage. Under his

direction and that of the President the appointments to office became, as it rarely had been in the past, a source of strength to the McKinley administration.

During these years Mr. Hanna accomplished in an exceptionally able manner the work of reenforcing and consolidating the existing leadership of the Republicans. The distribution of patronage necessarily occasions many personal disappointments and grievances, which weaken the President with certain individuals and factions in his party. Any disposition on the part of the President or his responsible advisers to play favorites or to cherish grudges, any tendency to misjudge men and to be deceived by plausible misrepresentations, any failure to distinguish properly between the more influential and the less influential factions, has a damaging effect upon party harmony and its power of effective cooperation. To name only recent examples Mr. Cleveland, Mr. Harrison and Mr. Taft have all weakened their administrations by mistakes in selections to office. No doubt President McKinley and Mr. Hanna made similar mistakes both from the point of view of administrative efficiency and of good feeling within the party, but on the whole they certainly exercised the President's power of appointment with unusual success. They not only selected for the higher offices efficient public servants, but by virtue of an unusually clear understanding of individuals and local political conditions, they made leading Republicans feel, in spite of certain individual grievances, that the offices were being distributed for the best interests of the whole party.

So far as Mr. Hanna was concerned, this success was due to his usual ability in partially systematizing and organizing the distribution of offices, while at the same time giving life to the system by tact and good judgment in dealing with individuals and with exceptional cases. In all those Northern states in which the Republicans exercised effective power, the system was already established and required merely good judgment in its application. It was in the South that he introduced a new and what he believed to be a definite system of making Federal appointments. The local offices were usually filled on the recommendation of the defeated congressional candidate, and Mr. Hanna expected by the recognition of these leaders of forlorn hopes to induce a better quality of men to run for the office. For the higher Federal offices, such as the United States Judges and Attorneys, the recommendations were usually accepted of a Board of Referees—consisting of the defeated candidate for Governor, the



chairman of the State Committee, and the member of the National Committee from that state. To a large extent the system worked automatically all over the Union, but of course any such method goes to pieces, in so far as conflicting individual or factional claims are intruded. It was in dealing with these exceptional cases that Mr. McKinley's tact was useful as well as Mr. Hanna's gift of understanding other men, of getting their confidence and of bending or persuading them to his will.

### c. Patronage in the Navy Department

[*Selections from the Correspondence of Theodore Roosevelt and Henry Cabot Lodge* (Charles Scribner's Sons), vol. I, pp. 282-283.]

#### NAVY DEPARTMENT OFFICE ASSISTANT SECRETARY WASHINGTON

September 29, 1897.

Dear Cabot:

. . . Barrett<sup>1</sup> has been clamoring for places so much that I had a little brush with him about the shipkeepers. When the Secretary left it seemed there would be two vacancies as shipkeeper, and he told Barrett he could have them. However, later it turned out there were three. I gave Barrett the two which the Secretary had said he should have, but I did not hold myself bound to give him the third, about which I telegraphed to you and ultimately put in MacCabe's man. This, and my putting in Wilson instead of one of the veterans whom Barrett recommended, evidently angered him not a little, and he wrote me, in effect asserting his claims to all the places in the navy yard. I wrote him very politely but very firmly in return, and have not heard from him since.

I have had one or two horrid times with the patronage. I got on all right with the Grand Army men in New York, and indeed I think with the Congressmen there and Senator Platt—at any rate so far as I know; but in Norfolk a G.A.R. man got drunk and was absent for a week (which he himself stated in his telegram now on file) and before he could be removed he resigned. Twelve days afterward the commander of the local post demanded his reinstatement. I refused, stating the facts, and he then wrote me a grossly impertinent and abusive letter, to which I simply responded that when he learned how to write a proper

<sup>1</sup> William E. Barrett, Congressman from Massachusetts.

letter I should answer it and not before. I have kept the correspondence complete.

What creatures those Pennsylvanians are! Even so good a fellow as Bingham is almost impossible to deal with, and Boies Penrose is worse. They have almost had epilepsy over a promotion from a \$1200 to a \$1400 clerkship, made under the rules in accordance with the recommendation of the commandant, just as we have made promotion after promotion in Brooklyn and Boston. It never occurred to me to consult them about it any more than I would have consulted you or Platt about similar affairs, for of course I knew nothing of the man's record and simply acted on the recommendation of the commandant. But this procedure very nearly gave them a fit. I have just had Bingham to lunch to smooth him down. . .

Faithfully yours,

THEODORE ROOSEVELT.

#### d. President Harding and the Patronage

[Correspondence between President Harding and I. C. Thoresen, Surveyor General of the Land Office for the District of Utah. *N. Y. Times*, Sept. 23, 1921.]

September 3, 1921.

My dear Sir:

Those of us who are responsible for the activities of the new Administration never like to do anything in an inconsiderate way. We are anxious to have men in positions of responsibility who are in full sympathy with the purposes and plans of the Administration. I need not tell you of the current demand for the recognition of aspirants within our party for consideration in the matter of patronage. I take you to be a practical man who knows of these developments with a sweeping change in national administration. Under all these circumstances I would very much like to have a new appointment in the office which you occupy. In all courtesy I would infinitely prefer to have you recognize the situation and make your resignation available. I am writing this letter in a kindly spirit to express a request that you recognize the situation and let me deal with the situation as you would probably wish to do if our positions were reversed.

Very truly yours,

WARREN G. HARDING.

September 9, 1921

My dear Mr. President:

The receipt of your courteous, considerate and outspoken letter of the 3d is very greatly appreciated, and especially so in comparison with the short, formal note of the Acting Secretary of the Interior requesting my resignation.

I cannot understand how the plans and policies of the Administration can in any way change or modify the formal duties of a Surveyor General. The surveys of the public lands under the specific directions and appropriations by Congress, making and approving plans and field notes thereof, and paying the expenses incurred thereby, are the sole duties of said office. Every employe therein is in the civil service. No material changes have been or can be made by any Administration.

Were this service affected by foreign policies or even domestic conditions, I would admit the consistency for a change, but in face of the facts I cannot do so. If, however, any minor changes in the administration of the duties of the office for its improvement are desired by the department, I am ready and willing to assist in their introduction, as I am an interested citizen of our glorious country much more than a partisan Democrat. I am in full and complete sympathy with every move for economical efficiency in the public service. I offer the entire record of my administration in this and other public offices I have held as proof of my integrity in serving the public efficiently, and of the economical expenditure of public funds.

It is well known that the demand for recognition of the Republican aspirants is exceedingly intense. But should all precedents of the past be set aside to pacify this partisan, selfish clamor? All of my predecessors have been permitted to serve their full terms; most of them more; the last served thirteen months after President Wilson's inauguration.

It therefore appears to me that I am the first and only person in the public service under an appointment for a specific term who has been requested to resign without being accused of any definite failure or neglect of duty. This matter has the appearance of personal spite or extreme radical political prejudice or greed, and I would be very sorry indeed should you lend the power of your great office—the greatest in all the world—for the success of such motives.

I have lived in Utah for nearly sixty years and my friends and relatives here are legion, and for their sakes, as well as for my own sake, I desire to maintain my good name and standing,

which I consider I cannot if I resign this office without good reasons made public and a general ousting of all other Democratic office holders.

It would certainly be considered a blemish upon my character and integrity, and I, therefore, cannot consistently comply with your courteous appeal.

Very respectfully,

I. C. THORESEN

### e. Prohibition and Patronage

[Letter of Senator Harreld to Assistant Secretary of the Treasury Andrews, in *N. Y. Times*, Oct. 9, 1925.]

Washington, D. C., Oct. 6, 1925.

United States Senate.

Hon. L. C. Andrews, Assistant Secretary of the Treasury,  
Washington, D. C.

My Dear General Andrews:

With further reference to our conversation by telephone this morning, I desire to state that I have learned from various sources that your new director at Fort Worth, Texas, has called for the resignation of the Rev. Thoroughman of Lawton, Okla., who has been on the force of M. F. Meadows, director at Oklahoma, for some time. Of course, in pursuance of the policy you have adopted not to consult Senators and Congressmen, Mr. White did not see fit to confer with me about it. I did not recommend Mr. Thoroughman's removal because I consider him a very efficient officer and was not consulted about it.

The churches at Lawton, consisting of some five or six on Sunday, Sept. 27, adopted, each of them, resolutions condemning the act of Mr. White in making this removal and expressing their utmost confidence in Mr. Thoroughman as an officer. The citizens of Lawton are generally up in arms about it and I am constrained to further insist that he should be reinstated, or else some good cause should be given as to why he should be removed. You have no idea what a furor this removal has raised, and they are charging me with the responsibility for it, as shown by clipping from the local paper at Lawton, which I enclose, and numerous letters which I have received in protest.

I was rather favorably impressed with Mr. White, the director at Fort Worth, when I met him and told him that I would not be unduly active in promoting any candidate for appointment

as enforcement officer, but I do insist that neither you nor he should do anything which will injure my standing in the State in which I live and endanger my chances for reelection in the coming campaign.

I therefore, think it would be advisable for you to direct Mr. White to consult Senator Pine and myself about the possible consequences of a removal of an old officer, or the appointment of a new one. I had thought I would try not to have anything to do with these appointments or removals, but I find there is no way I can evade this responsibility and I shall continue to exercise my right to express my approval or disapproval of the acts of your department in these particulars. The circumstances in this case show that it will be impossible to keep peace in the Republican Party in Oklahoma unless Senator Pine and myself are consulted about these appointments and removals and I feel it but fair to say to you in advance that we shall expect this courtesy from your department.

Yours very truly,

(Signed) J. W. HARRELD.

### 33. SENATORIAL COURTESY

The practice of the President in consulting members of Congress before making appointments in their states has been pointed out. Senators are particularly able to insist upon their right to be consulted in view of the requirement of senatorial confirmation. In connection with such appointment and confirmation the practice has been further developed that the Senate will generally as a matter of course and without inquiry into qualifications refuse to confirm appointments, if objection is made by the Senator or Senators from the state concerned, provided only they are of the President's own party. This readiness of the Senators to support one another in the matter of patronage is called "senatorial courtesy."

#### a. Custom of Senatorial Courtesy

[*Congressional Record*, vol. 62, pt. 7, pp. 6555-6557.]

[The Senate having under consideration the nomination of Nat Goldstein to be Collector of Internal Revenue in Missouri, the following colloquy occurred:]

MR. HARRISON. May I ask the Senator another question? Has any action been taken touching the Nat "Goldstain" nomination? . . .

MR. McCUMBER. Oh, no. Let me state to the Senator what is the usual course in such matters. The moment any nomination is sent to the committee, the chairman hands that nomination to

some Senator and asks him to consult with both the Senators from the State of the nominee to ascertain whether the nomination is satisfactory to them.

That is the first step to be taken, and it is the step which always has been taken, whether the Democratic Party or the Republican Party has been in control. If the nomination is satisfactory and if it is so reported to the committee, the committee act upon it. If, however, any extraneous matters have come to the attention of the committee to indicate that there will be opposition to the nomination, then, of course, the nomination is held in abeyance until such opposition may be heard.

### b. Working of Senatorial Courtesy

[Editorial in *N. Y. Times*, Mar. 21, 1921.]

All but two of the nominations submitted by Mr. Harding to the special session of the Senate were confirmed. The sacred dogma of "Senatorial courtesy" was invoked by Mr. LaFollette, who objected to the immediate confirmation of former Representative Esch of Wisconsin as a member of the Interstate Commerce Commission. Mr. Esch, Chairman of the House Committee on Interstate and Foreign Commerce in the Sixty-sixth Congress, has studied the railway question for more than twenty years. He has played a great part in the discussion and formulation of Federal regulation of railroads. He is pre-eminently fitted for service on the Interstate Commerce Commission.

His crime in Mr. LaFollette's eyes is his share in the Esch-Cummins Railroad act, a "betrayal of the people" and a sacrifice to "monopoly" that precipitated a deep downpour of rhetoric in Badgerdom last Fall. Mr. Esch was defeated. Mr. Lenroot, who voted for the bill, was re-elected to the Senate. Senatorial courtesy can hardly avail the senior Republican Senator from Wisconsin. His wrath against Mr. Esch is also wrath against Mr. Lenroot. The increased Republican majority in the Senate makes it no longer necessary to be so tender to the wishes of Mr. LaFollette. Mr. Lenroot, chosen in spite of his colleague, is the "regular" Republican Senator from Wisconsin. So it may be expected that the public interest, reinforced, to be sure, by the more august principle of partisanship, will prevail, and Mr. LaFollette's choler remain unsatisfied. The irregular and wild Glendower, an "assistant Democrat," isn't entitled to courtesy privileges in a Republican Senate, is he?

The other case is beautifully correct. Mr. Charles C. Madison

of Kansas City was nominated to be United States Attorney for the Western District of Missouri on the recommendation of Attorney General Daugherty. The appointment was made "without consulting Senator Spencer," an oversight much more momentous, one is tempted to believe, than a mere violation of the Constitution would be. Mr. Spencer "held up" the nomination. Telegrams of congratulation from local Republican leaders poured in on him. The Sixteenth Ward Republican Club of Kansas City deplores Madison and rejoices in Spencer, who has "taken the right attitude at a vital moment," the Chairmen of the County and the City Committees assure him. The Kansas City Star offers him the gratitude of his party for trying "to prevent the Administration from making a serious mistake." In short, there is a fine factional shindy of progressives and machinists, Mr. Madison representing the wicked, if we understand the row, and Mr. Spencer the good. The Missouri Republicans fought one another tumultuously last year. They are still at it. Such a blessing is the Federal patronage.

Whoever is mistaken and whoever is right in Washington or Kansas City, friends of tradition must be pleased to see Senatorial courtesy reappearing in the Senate Chamber. As a graduate, Mr. Harding must revere this old acquaintance. Still, suppose he chooses to call the Madison appointment "personal." And when appointments have hardly begun, may not objection that relies upon Senatorial courtesy look a little premature or indiscreet?

### 34. RECESS APPOINTMENTS

The President is empowered by the Constitution to fill temporarily any vacancy that may occur during a recess of the Senate, such recess appointment to be submitted for confirmation at the next Senate session, but in any case to be effective until the end of that session. If an appointment so made is not confirmed, the President may either submit a new name to the Senate or wait until that body adjourns, when a new vacancy is created which the President may fill in the same manner. On several occasions, and particularly in the case of negroes appointed to office in the South, the President has used this power so as to continue in office persons to whom Senators object, and whose appointments, through the operation of the rule of senatorial courtesy or otherwise, remain unconfirmed.

## a. Crum Case

[*Congressional Record*, vol. 38, pt. 2, pp. 1105, 1109, 1302.]

United States Senate  
Washington, D. C., January 8, 1904.

Hon. Leslie M. Shaw,

Secretary of the Treasury, Washington, D. C.

Sir:

Will you please give me an answer to the following questions:

First. When was Dr. W. D. Crum appointed collector of customs at the port of Charleston, S. C.? The date and character of his commission.

Second. Is he now in office? If so, under what authority of law?

Third. Did a new commission issue under the last appointment? If so, give date.

Fourth. Has he been required to give a bond under his last appointment?

Fifth. Has he ever received any compensation for his services, and if not, why not?

An early reply will be appreciated by,

Yours, respectfully,

B. R. TILLMAN.

Office of the Secretary, Treasury Department  
Washington, January 8, 1904.

My Dear Senator:

Replying to your note of January 8, relative to Dr. W. D. Crum, collector of customs at the port of Charleston, S. C., I beg to advise:

The vacancy occurred in the fall of 1902, possibly in September, during a recess of the United States Senate. Congress regularly convened in December of that year, and on December 31 Mr. Crum's nomination was sent to the Senate. The Senate adjourned on the 4th of March, without confirming the nomination. On the 5th of March, the Senate being in special session, the nomination was again sent in. The Senate adjourned without confirming, and on March 20, 1903, the President issued a temporary commission, under which Mr. Crum entered upon the discharge of his duties. He was allowed no compensation, however, in view of the statute prohibiting it under similar circumstances. I doubt not you are familiar with the statute. The



Senate again convened in special session in November, 1903, and the nomination was again sent in, but was not acted upon.

At the adjournment of that special session, and at precisely 12 o'clock noon of the first Monday in December, 1903, Mr. Crum was reappointed, and his nomination is now pending before the United States Senate. Under this last appointment Mr. Crum has again given bond and is in discharge of the duties of the office, but without compensation, for reasons heretofore referred to.

Very truly, yours,

Hon. B. R. Tillman,  
United States Senate.

(Signed) L. M. SHAW

### b. Warren Case

[*Congressional Record*, vol. 67, pt. 1, pp. 244-245.]

MR. REED of Missouri. . . . Mr. President, I understand that the United Press is sending out this statement, and to this I ask the attention of the Senate particularly:

While the Senate was heatedly debating the nomination of Charles Beecher Warren as Attorney General, President Coolidge announced at the White House he would give Warren a recess appointment to the post if the Senate did not confirm him.

. . . Mr. President, nothing is so necessary in sustaining any government as the orderly compliance by the officers of the government with not only the letter but the spirit of the law. There is no man who holds a public position who can not, if he sees fit so to do, while acting strictly within the cold letter of the law, nevertheless defeat its most beneficent purposes.

It would be a very sad day for this country if the Congress were arbitrarily to exercise a power granted to it in order to paralyze the arm of the Executive in the performance of the duties of his office. It will be a sad day for our country if we should to-night, or on Monday, reject Mr. Warren's name, and then send word to the President and to the country that we did not propose to approve any man whose name the President might send in. A Congress that would do that would be within the limits of its legal authority, but it would be serving the country but poorly.

If the President were to take the attitude indicated by these press accounts, then we would only have the converse of the case I have just put, of the President saying to the Senate, "The Constitution gives you the power to advise and consent, but I will

override that power. I will trample that right in the dust. I will do it by waiting until you adjourn. Then I will put in office the man whom you, under the authority granted you by the Constitution and the commission of the American people, have rejected, and about whom you have said, 'This man is unfitted for the position.' "

I can not bring myself to believe that the President of the United States is so lost to a proper conception of his duty as to take a position so arbitrary, so unjustifiable, and so violative of the spirit of the Constitution. I hope the information received is not true, for if it be true then indeed there has come a condition of contest and failure of cooperation between two departments of the Government which the American people have the right to believe never will exist.

MR. WALSH. Mr. President, in view of the statement issuing from the White House, to which I have directed the attention of the Senate, I am disposed to withdraw my objection to the unanimous consent requested by the Senator from Kansas. I am quite content that the President of the United States shall continue until Monday making "every possible effort to secure the confirmation of Mr. Warren." I am a little curious to know if there shall be any results of that continued effort during the next two days.

I venture to say that the annals of our country may be searched in vain for a parallel to this extraordinary statement which thus defies the Senate of the United States. Presidents have in the past, after the Senate has rejected an appointment, ventured to give a recess appointment, but none, sir, I undertake to say, has ever beforehand ventured to advise the Senate that, regardless of what they do, he will have his way about the appointment to a high office. This matter now presents a question that far transcends any inquiry concerning the fitness of Mr. Warren for this office. The Senate is now itself under test whether this power reposed in it by the Constitution shall simply be disregarded by the Executive hereafter in the selection of men for high office.

MR. CURTIS. Mr. President, I think the President was wholly within his rights, under the circumstances, in issuing this statement to the press, and as he gave the statement to the press I do not intend to comment on the wisdom of his having done so.

I have tried this afternoon to arrange to get a vote upon this question Monday. I believe that arrangement should have been made early in the day. It would have been better all around if

that had been done. I now renew my request that at the conclusion of executive business to-day the Senate take a recess until 11 o'clock Monday morning; that at 11 o'clock Monday morning we take up the nomination of Mr. Warren for Attorney General, and vote at not later than 2:30 o'clock on that day: that no Senator be permitted to speak for more than 30 minutes, and that the time be equally divided between those who oppose and those who favor the confirmation of Mr. Warren.

MR. ROBINSON. Mr. President, in view of the announcement from the White House challenging the right of the Senate to exercise its constitutional power, and to perform the duty which individual Senators swear they will perform when they become Members of this body, to advise and consent to nominations made by the Executive, a brief statement should be made.

I call the attention of the Senator from Kansas and of other Senators to the fact that the power to advise and consent is co-extensive with the power to nominate, and that the power and right of the Senate to exercise its functions under the Constitution being challenged by the Executive, there is raised an entirely different question from that involved in the determination of the fitness of an individual nominated to perform the functions of an office for which he has been selected by the Executive.

The challenge having been made, the Senate of the United States must meet it, and it must meet it fearlessly and decisively. No Executive has the right to insist that an officer whose nomination has not been advised and consented to by the Senate, but whose nomination has been rejected by the Senate, shall perform the functions of an office, high or low.

This question must be considered and determined by the Senate with a proper regard for the rights and prerogatives of the Executive. As the Senate has no justification to assume that the Executive, for a wrongful purpose, or for any purpose not sounding in the public interest, has nominated or will nominate for office an individual known to be unfit, so the Executive should recognize that no presumption must be indulged that this body, in performing its duty, in discharging the obligation imposed upon it by the Constitution, is transcending its authority and violating the rights of the Executive.

There is now subject matter for debate which an hour ago did not exist. As I can not tell the Executive whom to nominate, neither can the Executive tell me whose nomination I must consent to.

It is regrettable, sirs, that any conflict should arise between

coordinate branches of this Government. It was the theory of those who framed the Constitution that the Executive should have certain duties and should exercise certain prerogatives, and that the Senate should likewise be charged with responsibilities distinct from those imposed upon the Executive. When either branch of the Government challenges the constitutional authority of the other it becomes of great importance that the authority as vested by the Constitution shall be maintained. . . .

### 35. REMOVAL POWER

The power of removal is not mentioned in the Constitution, hence there has been doubt as to the location and extent of this power. On the whole, however, the practice has been to admit the absolute power of the President to remove all officials whom he may appoint, without limitation. During the quarrel between President Johnson and Congress, the correctness of that view was questioned, and Congress passed the Tenure-of-Office Act, requiring the consent of the Senate to the removal of important officers. For the violation of this Act, President Johnson was impeached but not convicted, and later the act was generally assumed to have been unconstitutional and was repealed. Acting in accordance with this general view of executive power, President Wilson in 1920 removed a postmaster in Oregon, who thereupon sued in the Court of Claims for his full four years' salary on the ground that Congress had fixed the term of postmasters at four years, and that the President had no constitutional power to terminate his statutory tenure by removal. The Court of Claims refused to allow the claim and finally the Supreme Court, in 1926, rendered an opinion, reviewing the whole subject of the removal power.

[*Myers v. United States* (1926), 272 U. S. 52, 127-177; 71 L. Ed. 160, 170-191.]

Argued and submitted December 5, 1924. Restored to docket for reargument January 5, 1925. Reargued April 13 and 14, 1925. Decided October 25, 1926.

Appeal by claimant from a judgment of the Court of Claims dismissing a petition filed to secure salary alleged to be due to claimant, as a postmaster, whom the President had attempted to remove from office without the advice and consent of the Senate. Affirmed.

See same case below, 58 Ct. Cl. 199. . . .

Mr. Chief Justice Taft delivered the opinion of the court:

This case presents the question whether under the Constitution the President has the exclusive power of removing executive offi-

cers of the United States whom he has appointed by and with the advice and consent of the Senate. . . .

A reference of the whole power of removal to general legislation by Congress is quite out of keeping with the plan of government devised by the framers of the Constitution. It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it. It would be a delegation by the Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government. The inclusion of removals of executive officers in the executive power vested in the President by article 2 according to its usual definition, and the implication of his power of removal of such officers from the provision of § 2 expressly recognizing in him the power of their appointment, are a much more natural and appropriate source of the removing power.

It is reasonable to suppose also that had it been intended to give to Congress power to regulate or control removals in the manner suggested, it would have been included among the specifically enumerated legislative powers in article 1, or in the specified limitations on the executive power in article 2. The difference between the grant of legislative power under article 1 to Congress which is limited to powers therein enumerated, and the more general grant of the executive power to the President under article 2 is significant. The fact that the executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed, and that no express limit is placed on the power of removal by the executive is a convincing indication that none was intended.

It is argued that the denial of the legislative power to regulate removals in some way involves the denial of power to prescribe qualifications for office, or reasonable classification for promotion, and yet that has been often exercised. We see no conflict between the latter power and that of appointment and removal, provided of course that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation. . . .

Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal. But it is contended that ex-

executive officers appointed by the President with the consent of the Senate are bound by the statutory law and are not his servants to do his will, and that his obligation to care for the faithful execution of the laws does not authorize him to treat them as such. The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act. The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion. This field is a very large one. It is sometimes described as political. *Kendall v. United States*, 12 Pet. 524 at p. 610, 9 L. ed. 1181, 1215. Each head of a department is and must be the President's alter ego in the matters of that department where the President is required by law to exercise authority. . . .

In all such cases, the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his cabinet officers must do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment that he loses confidence in the intelligence, ability, judgment or loyalty of any one of them, he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and co-ordination in executive administration essential to effective action.

The duties of the heads of departments and bureaus in which the discretion of the President is exercised and which we have described are the most important in the whole field of executive action of the government. There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him.

But this is not to say that there are not strong reasons why the President should have a like power to remove his appointees charged with other duties than those above described. The ordinary duties of officers prescribed by statute come under the gen-

eral administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them. Of course, there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly intrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed. . . .

The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so and this court has recognized that power. The court also has recognized in the Perkins Case that Congress in committing the appointment of such inferior officers to the heads of departments may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal. But the court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of the appellant, that the excepting clause enables Congress to draw to itself, or to either

branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers.

Assuming then the power of Congress to regulate removals as incidental to the exercise of its constitutional power to vest appointments of inferior officers in the heads of departments, certainly so long as Congress does not exercise that power, the power of removal must remain where the Constitution places it, with the President, as part of the executive power, in accordance with the legislative decision of 1789 which we have been considering. . . .

Summing up then the facts as to acquiescence by all branches of the Government in the legislative decision of 1789 as to executive officers whether superior or inferior, we find that from 1789 until 1863, a period of seventy-four years, there was no act of Congress, no executive act, and no decision of this court at variance with the declaration of the First Congress, but there was, as we have seen, clear affirmative recognition of it by each branch of the Government.

Our conclusion on the merits sustained by the arguments before stated is that article 2 grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers, a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that article 2 excludes the exercise of legislative power by Congress to provide for appointments and removals except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of article 2, which blend action by the legislative branch, or by part of it, in the work of the executive are limitations to be strictly construed and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; and finally that to hold otherwise would make it impossible for the President in case of political or other difference with the Senate or Congress to take care that the laws be faithfully executed. . . .



What, then, are the elements that enter into our decision of this case? We have first a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the Government in accord with the Constitution which had just then been adopted, and in which there were, as representatives and senators, a considerable number of those who had been members of the Convention that framed the Constitution and presented it for ratification. It was the Congress that launched the Government. It was the Congress that rounded out the Constitution itself by the proposing of the first ten amendments which had in effect been promised to the people as a consideration for the ratification. It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the Government under it. It was a Congress whose constitutional decisions have always been regarded as they should be regarded as of the greatest weight in the interpretation of that fundamental instrument. This construction was followed by the legislative department and the executive department continuously for seventy-three years, and this, although the matter in the heat of political differences between the Executive and the Senate in President Jackson's time, was the subject of bitter controversy, as we have seen. This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs acquiesced in for a long term of years fixes the construction to be given its provisions. . . .

We are now asked to set aside this construction thus buttressed and adopt an adverse view, because the Congress of the United States did so during a heated political difference of opinion between the then President and the majority leaders of Congress over the reconstruction measures adopted as a means of restoring to their proper status the states which attempted to withdraw from the Union at the time of the Civil War. The extremes to which the majority in both Houses carried legislative measures in that matter are now recognized by all who calmly review the history of that episode in our Government leading to articles of impeachment against President Johnson and his acquittal. Without animadverting on the character of the measures taken, we are certainly justified in saying that they should not be given the weight affecting proper constitutional construction to be accorded to that reached by the First Congress of the United States

during a political calm and acquiesced in by the whole Government for three-quarters of a century, especially when the new construction contended for has never been acquiesced in by either the executive or the judicial departments. While this court has studiously avoided deciding the issue until it was presented in such a way that it could not be avoided, in the references it has made to the history of the question, and in the presumptions it has indulged in favor of a statutory construction not inconsistent with the legislative decision of 1789, it has indicated a trend of view that we should not and can not ignore. When on the merits we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct; and it therefore follows that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid and that subsequent legislation of the same effect was equally so.

For the reasons given, we must therefore hold that the provision of the law of 1876 by which the unrestricted power of removal of first class postmasters is denied to the President is in violation of the Constitution and invalid. This leads to an affirmation of the judgment of the Court of Claims.

Before closing this opinion we wish to express the obligation of the court to Mr. Pepper for his able brief and argument as a friend of the court. Undertaken at our request, our obligation is none the less if we find ourselves obliged to take a view adverse to his. The strong presentation of arguments against the conclusion of the court is of the utmost value in enabling the court to satisfy itself that it has fully considered all that can be said.

Judgment affirmed.

[Justices Holmes, McReynolds, and Brandeis dissented.]

### 36. ENFORCEMENT OF LAW

The President is required by the Constitution to "take care that the laws be faithfully executed." It is obvious, however, that in spite of this solemn injunction the vigor and faithfulness with which the laws actually are enforced will depend in large measure upon the President's sympathy with the policy involved, upon his interpretation of what the law means, and upon his conception of the exigencies of the moment. Although the responsibility of enforcement rests definitely upon the President, Congress has also on occasion undertaken in one way or another to force his hand or that of his subordinates with respect to such enforcement.

a. Letter of President Wilson to Attorney General McReynolds, with respect to the Anti-Trust Law

[*Senate Document No. 555, 63 Cong., 2 Sess., p. 3.*]

The White House,  
Washington, July 21, 1914.

My Dear Mr. Attorney-General:

I have your letter of to-day, inclosing a copy of your letter of July 9 to Mr. J. H. Hustis, president of the New York, New Haven & Hartford Railroad Co., which together disclose the failure of the directors of the New York, New Haven & Hartford Railroad Co. to comply with the terms of the settlement proposed by them and accepted by us in the matter of their railroad holdings. Their final decision in this matter causes me the deepest surprise and regret. Their failure, upon so slight a pretext, to carry out an agreement deliberately and solemnly entered into, and which was manifestly in the common interest, is to me inexplicable and entirely without justification.

You have been kind enough to keep me informed of every step the Department took in this matter, and the action of the Department has throughout met with my entire approval. It was just, reasonable, and efficient. It should have resulted in avoiding what must now be done.

In the circumstances the course you propose is the only one the Government can pursue. I therefore request and direct that a proceeding in equity be filed, seeking the dissolution of unlawful monopoly of transportation facilities in New England now sought to be maintained by the New York, New Haven & Hartford Railroad Co., and that the criminal aspects of the case be laid before a grand jury.

(Signed) WOODROW WILSON.

Hon. J. C. McReynolds,  
Attorney General

b. Letter of President Harding to Secretary Mellon, with respect to Prohibition Enforcement

[*Virginia Law Review*, vol. XIII, p. 95 n.]

My dear Mr. Secretary:

Supplementing my letter of instruction of October 6, relating to the enforcement of the Eighteenth Amendment and the Prohibition Enforcement Act as applied to carriers at sea, you will

please direct United States customs officials to give notice to all shipping lines that pending the formulation of regulations the enforcement of the prohibition of transportation of cargoes or ship stores will not be practicable in the case of foreign vessels leaving their home ports or American vessels leaving foreign ports on or before October 14.

Any earlier attempt at enforcement, in the absence of due notice and ample regulations, would be inconsistent with just dealing and have a tendency to disrupt needlessly the ways of commerce.

This delay in full enforcement does not apply to the sale of intoxicating liquor on vessels sailing under the American flag

Very truly yours,

WARREN G. HARDING.

### c. President Harding and the Merchant Marine Act of 1920

[Address to Congress, Dec. 6, 1921. *Congressional Record*, vol. 62, pt. 1, p. 37.]

The previous Congress, deeply concerned in behalf of our merchant marine, in 1920 enacted the existing shipping law, designed for the upbuilding of the American merchant marine. Among other things provided to encourage our shipping on the world's seas, the Executive was directed to give notice of the termination of all existing commercial treaties in order to admit of reduced duties on imports carried in American bottoms. During the life of the act no Executive has complied with this order of the Congress. When the present administration came into responsibility, it began an early inquiry into the failure to execute the expressed purpose of the Jones Act. Only one conclusion has been possible. Frankly, Members of House and Senate, eager as I am to join you in the making of an American merchant marine commensurate with our commerce, the denouncement of our commercial treaties would involve us in a chaos of trade relationships and add indescribably to the confusion of the already disordered commercial world. Our power to do so is not disputed, but power and ships, without comity of relationship, will not give us the expanded trade which is inseparably linked with a great merchant marine. Moreover, the applied reduction of duty, for which treaty denouncement were necessary, encouraged only the carrying of dutiable imports to our shores, while the tonnage which unfurls the flag on the seas

is both free and dutiable, and the cargoes which make a nation eminent in trade are outgoing rather than incoming.

It is not my thought to lay the problem before you in detail today. It is desired only to say to you that the executive branch of the Government, uninfluenced by the protest of any nation, for none has been made, is well convinced that your proposal, highly intended and heartily supported here, is fraught with difficulties and so marked by tendencies to discourage trade expansion, that I invite your tolerance of noncompliance for only a very few weeks until a plan may be presented which contemplates no greater draft upon the Public Treasury, and which, though yet too crude to offer it today, gives such promise of expanding our merchant marine that it will argue its own approval. It is enough to say today that we are so possessed of ships, and the American intention to establish a merchant marine is so unalterable that a plan of reimbursement, at no other cost than is contemplated in the existing act, will appeal to the pride and encourage the hope of all the American people.

#### d. Joint Resolution respecting Prosecution of Oil Leases

[*Congressional Record*, vol. 65, pt. 2, pp. 1728-1729.]

A joint resolution directing the President to institute and prosecute suits to cancel certain leases of oil lands and incidental contracts, and for other purposes.

Whereas it appears from evidence taken by the Committee on Public Lands and Surveys of the United States Senate that certain lease of naval reserve No. 3, in the State of Wyoming, bearing date April 7, 1922, made in form by the Government of the United States, through Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy, as lessor, to the Mammoth Oil Co., as lessee, and that certain contract between the Government of the United States and the Pan American Petroleum & Transport Co., dated April 25, 1922, signed by Edward C. Finney, Acting Secretary of the Interior, and Edwin Denby, Secretary of the Navy, relating among other things to the construction of oil tanks at Pearl Harbor, Territory of Hawaii, and that certain lease of naval reserve No. 1, in the State of California, bearing date December 11, 1922, made in form by the Government of the United States through Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy, as lessor, to the Pan American Petroleum Co., as lessee, were

executed under circumstances indicating fraud and corruption; and

Whereas the said leases and contract were entered into without authority on the part of the officers purporting to act in the execution of the same for the United States and in violation of the laws of Congress; and

Whereas such leases and contract were made in defiance of the settled policy of the Government adhered to through three successive administrations, to maintain in the ground a great reserve supply of oil adequate to the needs of the Navy in any emergency threatening the national security: Therefore be it

*Resolved, etc.*, That the said leases and contract are against the public interest and that the lands embraced therein should be recovered and held for the purpose to which they were dedicated; and

*Resolved further*, That the President of the United States be, and he hereby is, authorized and directed immediately to cause suit to be instituted and prosecuted for the annulment and cancellation of the said leases and contract and all contracts incidental or supplemental thereto, to enjoin further extraction of oil from the said reserves under said leases or from the territory covered by the same, to secure any further appropriate incidental relief, and to prosecute such other actions or proceedings, civil and criminal, as may be warranted by the facts in relation to the making of the said leases and contract.

And the President is further authorized and directed to appoint, by and with the advice and consent of the Senate, special counsel who shall have charge and control of the prosecution of such litigation, anything in the statutes touching the powers of the attorney General of the Department of Justice to the contrary notwithstanding.

### 37. ORDINANCE POWER

The function of legislation is, of course, vested primarily in Congress. It is, however, impossible to enact laws in such detail as to cover every contingency, hence it becomes frequently necessary to supplement statutes with detailed regulations. The power to make such rules and regulations is to a considerable extent vested in the President by statute, but occasionally may be exercised without any clear or specific constitutional or statutory authority, being nevertheless upheld as necessary for the proper conduct of the administration with which the President is entrusted. The power to make and issue these rules and regulations that have the force and effect of law is called the ordinance power, and may be exercised by the President himself or by his subordinates acting on his authority. The various forms through which the ordinance power is exercised are illus

## a. Proclamation with respect to War-time Prohibition

[*U. S. Statutes*, 65 Cong., 2 Sess., Proclamations, pp. 204-205.]

*By the President of the United States of America:*

## A Proclamation

Whereas, Under and by virtue of an act of Congress entitled "An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved by the President on August 10, 1917, it is provided in Section 15, among other things, as follows:

Whenever the President shall find that limitation, regulation, or prohibition of the use of foods, fruits, food materials, or feeds in the production of malt or vinous liquors for beverage purposes, or that reduction of the alcoholic content of any such malt or vinous liquors, is essential, in order to assure an adequate and continuous supply of food, or that the national security and defense will be subserved thereby, he is authorized, from time to time, to prescribe and give public notice of the extent of the limitation, regulation, prohibition, or reduction, so necessitated. Whenever such notice shall have been given and shall remain unrevoked, no person shall, after a reasonable time prescribed in such notice, use any foods, fruits, food materials, or feeds in the production of malt or vinous liquors, or import any such liquors except under license issued by the President and in compliance with rules and regulations determined by him governing the production and importation of such liquors and the alcoholic content thereof.

Now, Therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the powers conferred on me by said act of Congress, do hereby find and determine that it is essential, in order to assure an adequate and continuous supply of food, in order to subserve the national security and defense, and because of the increasing requirements of war industries for the fuel productive capacity of the country, the strain upon transportation to serve such industries, and the shortage of labor caused by the necessity of increasing the armed forces of the United States, that the use of sugar, glucose, corn, rice, or any other foods, fruits, food materials, and feeds in the production of malt liquors, including near beer, for beverage purposes be prohibited. And by this proclamation I prescribe and give public notice that on and after October 1, 1918, no person shall use any sugar, glucose, corn, rice, or any other foods, fruits, food

materials, or feeds, except malt now already made, and hops, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol; and on and after December 1, 1918, no person shall use any sugar, glucose, corn, rice, or any other foods, fruits, food materials, or feeds, including malt, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol.

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia, this sixteenth day of September in the year of our Lord one thousand nine hundred and eighteen, and of the independence of the United States of America the one hundred and forty-third.

[SEAL]

WOODROW WILSON.

By the President:

Robert Lansing,  
*Secretary of State.*

#### **b. Executive Order with respect to the Foreign Service**

[*Congressional Record*, vol. 67, pt. 10, p. 10992.]

### **EXECUTIVE ORDER**

The following regulations are hereby prescribed for the guidance of the representatives of the Government of the United States in foreign countries with a view to giving unified direction to their activities in behalf of the promotion and protection of the commercial and other interests of the United States, insuring effective cooperation, and encouraging economy in administration.

Whenever representatives of the Department of State and other departments of the Government of the United States are stationed in the same city in a foreign country they will meet in conference at least fortnightly under such arrangements as may be made by the chief diplomatic officer or, at posts where there is no diplomatic officer, by the ranking consular or other officer.

It shall be the purpose of such conferences to secure a free interchange of all information bearing upon the promotion and protection of American interests.

It shall be the duty of all officers to furnish in the most expeditious manner, without further reference, all economic and trade information requested by the ranking officers in the service



of other departments of the Government assigned to the same territory: *Provided*, That where such compliance would be incompatible with the public interest or where the collection of such information requires research of such exhaustive character that the question of interference with regular duties arises, decision as to compliance shall be referred to the chief diplomatic officer or to his designated representative or, in the absence of such officers, to the supervising consular officer in the said jurisdiction. All failures to provide information requested as hereinbefore set forth shall be reported immediately by cable to the departments having jurisdiction over the officers concerned.

With a view to eliminating unnecessary duplication of work, officers in the same jurisdiction shall exchange at least fortnightly a complete inventory of all economic and trade reports in preparation or in contemplation.

Copies of all economic and trade reports prepared by consular or other foreign representatives shall be filed in the appropriate embassy or legation of the United States or, where no such office exists, in the consulate general and shall be available to the ranking foreign representatives of all departments of the Government. Extra copies shall be supplied upon request by the officer making the report.

The customary channel of communication between consular officers and officers of other departments in the foreign field shall be through the supervising consular general, but in urgent cases or those involving minor transactions such communications may be made direct: *Provided*, That copies of all written communication thereof are simultaneously furnished to the consul general for his information. It shall be the duty of supervising consuls general to expedite intercommunication and exchange of material between the consular service and all other foreign representatives of the United States.

Upon the arrival of a representative of any department of the Government of the United States in any foreign territory in which there is an embassy, legation, or consulate general, for the purpose of special investigation, he shall at once notify the head of the diplomatic mission of his arrival and the purpose of his visit, and it shall be the duty of said officer or of his designated representative, or in the absence of such officer, then the supervising consular officer, to notify, when not incompatible with the public interest, all other representatives of the Government of the United States in that territory of the arrival and the purpose of the visit, and to take such steps as may be appropriate

to assist in the accomplishment of the object of the visit without needless duplication of work.

In all cases of collaboration, or where material supplied by one officer is utilized by another, full credit therefor shall be given.

CALVIN COOLIDGE.

THE WHITE HOUSE, *April 4, 1924.*

### c. Departmental Order with respect to a Foreign Service School

[*Lay, Foreign Service of the United States* (Prentice-Hall, Inc.), pp. 425-426.]

#### Departmental Order

(No. 296)

#### The Foreign Service School

The President by Executive Order of June 7, 1924, having provided for the establishment of a Foreign Service School in the Department of State, the following rules and regulations are hereby made for the governance of the School:

1. The Chief Instructor shall be selected from among Foreign Service Officers of class five or over.
2. He shall have the following duties:
  - (a) To prepare and submit to the School Board for approval a complete schedule of work to be covered during the term of instruction.
  - (b) To select instructors in the various subjects from among the qualified officers of the Department of State, the Foreign Service, the other Executive Departments of the Government, and other available sources.
  - (c) To instruct the School in subjects selected and approved by the Board.
  - (d) To maintain the discipline of the School and bear responsibility therefor.
  - (e) To keep a record of attendance and an impartial, confidential rating of each pupil with respect to his qualifications for the Foreign Service.
  - (f) To act as a member of the School Board.
  - (g) To make reports on the work of the School and the individual pupils at the end of the term of instruction or whenever required by the School Board or the Secretary of State.
3. Each term of instruction shall begin and end on dates to be fixed by the School Board.

4. Each foreign service pupil shall be assigned to one of the divisions or bureaus of the Department of State, where he will report for duty when not attending classes.
5. The Chiefs of the divisions or bureaus shall report to the Chief Instructor the character of the work done by the pupils assigned to them, together with any delinquencies.

CHARLES E. HUGHES.

Department of State,  
June 9, 1924.

### 38. PURPOSE OF VETO

The veto power is given to the President, subject to certain limitations, but without any qualification as to the conditions or purposes which should govern the President in his use of this power. During the earlier years of our history, it was generally felt that he ought not to pass upon the wisdom of legislation, but should use his veto for the purpose of protecting his own independent position and prerogatives against congressional interference, and probably to secure a more genuine consideration of measures by Congress. Later, however, the Presidents have not hesitated to use the veto in order to express disapproval of the substance of legislation as well as of its constitutionality. These various uses of the veto, as well as the actual method in executive consideration, are indicated below.

#### a. View of Hamilton

[*The Federalist*, No. 73.]

The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments, has been already suggested and repeated; the insufficiency of a mere parchment delineation of the boundaries of each, has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defence, has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the executive, upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions or annihilated by a single vote. And in the one mode or the other the legislative and executive powers might speedily come to be blended in the same hands. If even no propensity had ever discovered itself in the legislative body to invade the rights of the executive, the rules of just reasoning and theoretic propriety would of themselves teach us that the one ought not to be left at

the mercy of the other, but ought to possess a constitutional and effectual power of self-defence.

But the power in question has a further use. It not only serves as a shield to the executive, but it furnishes an additional security against the enactment of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body.

The propriety of a negative has upon some occasions been combated by an observation that it was not to be presumed a single man would possess more virtue and wisdom than a number of men; and that unless this presumption should be entertained it would be improper to give the executive magistrate any species of control over the legislative body.

But this observation, when examined, will appear rather specious than solid. The propriety of the thing does not turn upon the supposition of superior wisdom or virtue in the executive, but upon the supposition that the legislative will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of the other members of the government; that a spirit of faction may sometimes pervert its deliberations; that impressions of the moment may sometimes hurry it into measures which itself, on maturer reflection, would condemn. The primary inducement to conferring the power in question upon the executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws through haste, inadvertence, or design. The oftener a measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation or of those missteps which proceed from the contagion of some common passion or interest. It is far less probable that culpable views of any kind should infect all the parts of the government at the same moment and in relation to the same object, than that they should by turns govern and mislead every one of them.

It may, perhaps, be said that the power of preventing bad laws includes that of preventing good ones, and may be used to the one purpose as well as to the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws which form the greatest blemish in the character and genius of our governments.

They will consider every institution calculated to restrain the excess of law-making, and to keep things in the same state in which they may happen to be at any given period, as much more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones.

Nor is this all. The superior weight and influence of the legislative body in a free government, and the hazard to the executive in a trial of strength with that body, afford a satisfactory security that the negative would generally be employed with great caution; and there would oftener be room for a charge of timidity than of rashness in the exercise of it. A king of Great Britain, with all his train of sovereign attributes and with all the influence he draws from a thousand sources, would, at this day, hesitate to put a negative upon the joint resolutions of the two Houses of Parliament. He would not fail to exert the utmost resources of that influence to strangle a measure disagreeable to him, in its progress to the throne, to avoid being reduced to the dilemma of permitting it to take effect or of risking the displeasure of the nation by an opposition to the sense of the legislative body. Nor is it probable that he would ultimately venture to exert his perogatives, but in a case of manifest propriety or extreme necessity. All well-informed men in that kingdom will accede to the justness of this remark. A very considerable period has elapsed since the negative of the Crown has been exercised.

If a magistrate so powerful and so well fortified as a British monarch would have scruples about the exercise of the power under consideration, how much greater caution may be reasonably expected in a President of the United States, clothed for the short period of four years with the executive authority of a government wholly and purely republican?

It is evident that there would be greater danger of his not using his power when necessary than of his using it too often or too much. An argument, indeed, against its expediency has been drawn from this very source. It has been represented, on this account, as a power odious in appearance, useless in practice. But it will not follow that because it might be rarely exercised, it would never be exercised. In the case for which it is chiefly designed, that of an immediate attack upon the constitutional rights of the executive, or in a case in which the public good was

evidently and palpably sacrificed, a man of tolerable firmness would avail himself of his constitutional means of defence, and would listen to the admonitions of duty and responsibility. In the former supposition, his fortitude would be stimulated by his immediate interest in the power of his office; in the latter, by the probability of the sanction of his constituents; who, though they would naturally incline to the legislative body in a doubtful case, would hardly suffer their partiality to delude them in a very plain case. I speak now with an eye to a magistrate possessing only a common share of firmness. There are men who, under any circumstances, will have the courage to do their duty at every hazard.

### b. President Wilson's Veto of Budget Bill

[*Congressional Record*, vol. 59, pt. 8, pp. 8609-8610.]

#### *To the House of Representatives:*

I am returning without my signature H. R. 9783, "An act to provide a national budget system, an independent audit of Government accounts, and for other purposes." I do this with the greatest regret. I am in entire sympathy with the objects of this bill and would gladly approve it but for the fact that I regard one of the provisions contained in section 303 as unconstitutional. This is the provision to the effect that the comptroller general and the assistant comptroller general, who are to be appointed by the President with the advice and consent of the Senate, may be removed at any time by a concurrent resolution of Congress after notice and hearing, when, in their judgment, the comptroller general or assistant comptroller general is incapacitated or inefficient, or has been guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment. The effect of this is to prevent the removal of these officers for any cause except either by impeachment or a concurrent resolution of Congress. It has, I think, always been the accepted construction of the Constitution that the power to appoint officers of this kind carries with it, as an incident, the power to remove. I am convinced that the Congress is without constitutional power to limit the appointing power and its incident, the power of removal derived from the Constitution.

The section referred to not only forbids the Executive to remove these officers but undertakes to empower the Congress by a concurrent resolution to remove an officer appointed by the

President with the advice and consent of the Senate. I can find in the Constitution no warrant for the exercise of this power by the Congress. There is certainly no express authority conferred, and I am unable to see that authority for the exercise of this power is implied in any express grant of power. On the contrary, I think its exercise is clearly negatived by section 2 of Article II. That section, after providing that certain enumerated officers and all officers whose appointments are not otherwise provided for shall be appointed by the President with the advice and consent of the Senate, provides that the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of department. It would have been within the constitutional power of the Congress, in creating these offices, to have vested the power of appointment in the President alone, in the President with the advice and consent of the Senate, or even in the head of a department. Regarding as I do the power of removal from office as an essential incident to the appointing power, I can not escape the conclusion that the vesting of this power of removal in the Congress is unconstitutional and therefore I am unable to approve the bill.

I am returning the bill at the earliest possible moment with the hope that the Congress may find time before adjournment to remedy this defect.

WOODROW WILSON.

The White House, June 4, 1920.

### c. President Wilson's Veto of Immigration Bill

[*Congressional Record*, vol. 52, pt. 3, pp. 2481-2482.]

The White House, January 28, 1915.

*To the House of Representatives:*

It is with unaffected regret that I find myself constrained by clear conviction to return this bill (H. R. 6060, "An act to regulate the immigration of aliens to and the residence of aliens in the United States") without my signature. Not only do I feel it to be a very serious matter to exercise the power of veto in any case, because it involves opposing the single judgment of the President to the judgment of a majority of both the Houses of the Congress, a step which no man who realizes his own liability to error can take without great hesitation, but also because this particular bill is in so many important respects admirable, well

conceived, and desirable. Its enactment into law would undoubtedly enhance the efficiency and improve the methods of handling the important branch of the public service to which it relates. But candor and a sense of duty with regard to the responsibility so clearly imposed upon me by the Constitution in matters of legislation leave me no choice but to dissent.

In two particulars of vital consequence this bill embodies a radical departure from the traditional and long-established policy of this country, a policy in which our people have conceived the very character of their Government to be expressed, the very mission and spirit of the Nation in respect of its relations to the peoples of the world outside their borders. It seeks to all but close entirely the gates of asylum which have always been open to those who could find nowhere else the right and opportunity of constitutional agitation for what they conceived to be the natural and inalienable rights of men; and it excludes those to whom the opportunities of elementary education have been denied, without regard to their character, their purposes, or their natural capacity.

Restrictions like these, adopted earlier in our history as a Nation, would very materially have altered the course and cooled the humane ardors of our politics. The right of political asylum has brought to this country many a man of noble character and elevated purpose who was marked as an outlaw in his own less fortunate land, and who has yet become an ornament to our citizenship and to our public councils. The children and the compatriots of these illustrious Americans must stand amazed to see the representatives of their Nation now resolved, in the fullness of our national strength and at the maturity of our great institutions, to risk turning such men back from our shores without test of quality or purpose. It is difficult for me to believe that the full effect of this feature of the bill was realized when it was framed and adopted, and it is impossible for me to assent to it in the form in which it is here cast.

The literacy test and the tests and restrictions which accompany it constitute an even more radical change in the policy of the Nation. Hitherto we have generously kept our doors open to all who were not unfitted by reason of disease or incapacity for self-support or such personal records and antecedents as were likely to make them a menace to our peace and order or to the wholesome and essential relationships of life. In this bill it is proposed to turn away from tests of character and of quality and impose tests which exclude and restrict; for the new tests here



embodied are not tests of quality or of character or of personal fitness, but tests of opportunity. Those who come seeking opportunity are not to be admitted unless they have already had one of the chief of the opportunities they seek, the opportunity of education. The object of such provisions is restriction, not selection.

If the people of this country have made up their minds to limit the number of immigrants by arbitrary tests and so reverse the policy of all the generations of Americans that have gone before them, it is their right to do so. I am their servant and have no license to stand in their way. But I do not believe that they have. I respectfully submit that no one can quote their mandate to that effect. Has any political party ever avowed a policy of restriction in this fundamental matter, gone to the country on it, and been commissioned to control its legislation? Does this bill rest upon the conscious and universal assent and desire of the American people? I doubt it. It is because I doubt it that I make bold to dissent from it. I am willing to abide by the verdict, but not until it has been rendered. Let the platforms of parties speak out upon this policy and the people pronounce their wish. The matter is too fundamental to be settled otherwise.

I have no pride of opinion in this question. I am not foolish enough to profess to know the wishes and ideals of America better than the body of her chosen representatives know them. I only want instruction direct from those whose fortunes, with ours and all men's are involved.

WOODROW WILSON.

### 39. ADMINISTRATION MEASURES

Although the President and his Cabinet do not have seats in Congress or the right formally to introduce bills, as do the ministers in countries under the parliamentary system, yet there are several means by which the Executive may indicate its views and influence Congress in the enactment of legislation. A practice of growing importance in this connection is the preparation of bills by the President himself or by his principal administrative officers, on matters relating to the work of their departments. These measures, having the full weight of the Administration behind them, are called administration measures. They will readily be introduced by some one of the President's supporters and will usually be given priority of consideration. The practice has, indeed, become so common, and has been so successful in giving the Executive a hand in legislation, as to cause some misgivings on the part of members of Congress, who may look upon it as an encroachment upon their prerogatives.

MR. HEYBURN. Mr. President, if I may interrupt the proceedings at this time and have unanimous consent, I desire to call the attention of the Senate to some matters that appear upon the face of this morning's *Record* with reference to the introduction of bills, which, so far as I am advised, are of rather an unusual character.

I would call the attention of the Senate to the paragraph in this morning's *Record*, on page 1, which reads as follows:

The Vice-President laid before the Senate a communication from the Secretary of the Interior, transmitting a draft of a bill to authorize the leasing of irrigable allotted lands, the lands reserved for the use of the Indians in common, for agricultural purposes, etc., which, with the accompanying paper, was referred to the Committee on Indian Affairs and ordered to be printed.

I am not advised of any rule of the Senate or of any law under which the Secretary of the Interior may introduce a bill into the Senate of the United States and have it referred, read, or printed.

I find that on the first page of this morning's *Record* there are quite a large number of such instances. I should like to inquire by what authority the head of a Department of the executive branch of the Government may introduce, either directly or indirectly, into this body a proposed measure of legislation of any kind, whether it be a resolution or a bill. It seems to me opportune at this time to interpose the inquiry, that I may be advised as to the rule and the authority for such a proceeding.

THE VICE-PRESIDENT. The Chair understands that according to the practice which has prevailed heretofore such matters are in the nature of communications from the heads of Departments; that they go to the committee having jurisdiction over the subject to which they relate simply as matters of information, and the committee report them back in the shape of original bills if they see fit.

MR. HEYBURN. Mr. President, I understand that under the rules of the Senate it is the privilege of any member at any time to object to the introduction of a bill. Bills are introduced only with the consent, or by the permission, of this body, and I can see some danger in any rule or practice which permits a Department to introduce a bill in this method, which deprives any member of the body of an opportunity to object to the bill being read a first or second time. These bills go to the appropriate committee; they go to the committee indirectly from the executive branch of the Government, and I think it will appear

that on some occasions in the past they have been reported back in substantially the same shape that they were presented to the body. I think that all bills which are referred which go to a committee should go there under the rules of the Senate. I, for one, desire to enter a protest against thus indirectly admitting anyone not a member of this body to the privilege of introducing bills and having them referred to committees.

MR. CARTER. Mr. President, the suggestion of the Senator from Idaho as to the utter impropriety of any attempt on the part of anyone to introduce a bill into the Senate save and except a Senator is very appropriate as a criticism; but I doubt its application to the case he has presented or to any similar case.

It is customary for the head of a Department to send communications to the Senate on any subject within the jurisdiction of the Department. Such communications may suggest the need for remedial legislation as disclosed in the ordinary course of administration. Such suggestion may be made frequently in more cogent and intelligent form by presenting not a bill, but the thought crystallized into a proposed bill. The bill is not read the first and second times in the Chamber, nor is it introduced as a bill in the Senate. It accompanies the communication from the head of the Department in the way of explanatory matter, showing in terse form just how the thought sought to be incorporated into law could be, according to the Department's idea, clearly expressed. It is frequently easier to express in the form of proposed legislation the object sought to be accomplished than it is to attempt to do the same thing by the extensive use of language in a descriptive way. . . .

MR. LODGE. Mr. President, I think I was correct in saying that the habit has insensibly grown up, and that it also is spreading, on the part of heads of Departments to make voluntary communications or to volunteer communications directly to the Senate or to the House. I do not think it can be controverted that strictly those communications can only come through transmission by the President, and I think it is always well to be a little strict in the observance of the law and not to allow such irregular customs, even if apparently harmless, to grow up.

But certainly, Mr. President, the practice of submitting bills from the Departments without request to the two Houses is something quite recent, unless my memory is all astray, and that is a very much more important matter. . . .

I think, Mr. President, it is just as well to put a stop to this submission of drafts of bills to Congress by subordinate execu-

tive officers or by heads of Departments unless they are thereto requested by one of the two Houses. I do not think that volunteering bills from the Executive Department is the proper method.

Of course, under the English system, the bills are prepared by the executive government, which is a committee in fact of the two Houses, and they prepare their own measures and introduce them. But here the Executive Department is distinct, and unless we ask for drafts or bills for our own convenience and for the promotion of good legislation, it seems to me that it is irregular, and unwisely irregular, to fall into the practice of having officers of the Executive Department present bills to Congress in this way.

Half a dozen came in the other day. They were referred to committees without taking any readings. They were referred to committees for consideration. Those bills have no Calendar number. They do not take the ordinary course of any other bills. I think it is an irregular way, both under the rules and under the statute.

I do not want to cut off the advantage that we have in getting officers of the Departments to draw proper bills for us. That is a duty which I hope they will always perform, on the request of the Houses. But I do not think that they ought to submit bills unasked for, which shall go in this irregular way to committees for consideration. If the head of a Department has legislation in which he is interested and presents it to the chairman of a committee or some other Senator, and he sees fit to introduce it, that of course is perfectly proper. The bill takes the usual course. But this is irregular, just as is this method of submitting reports. I do not care how long the custom has lasted, it is an irregularity which has grown up. If we are to have information volunteered from the Departments, let it come through the President of the United States, and any other information we want from the Departments we can ask for. . . .

MR. HEYBURN. . . . Now, it is no part of the duty or the province of any Department of the Government to participate in the legislation or in the legislative processes of this body. We are quite capable, in our own judgment and in that of the country, of framing and considering and enacting necessary legislation to meet every requirement, every contingency, and I think the sooner we adopt a rule that shall divorce the executive branch of the Government entirely from participation in the legislation of the country the more nearly we will have planted ourselves

upon the original scheme of our Government, which wisely intended that there should be no merging or overlapping in the performance of those duties.

The Executive Departments have only the powers we give them. These Departments of the Government have no original powers resting on the organic law of the land. They have such powers and such rights and such duties as we confer upon them. They are there to execute the will of the people as expressed by Congress, which is the only tribunal under the Constitution that speaks the will of the people. If they confine themselves to that duty they will accomplish most fully the purpose for which the Departments were organized.

#### 40. PARDON AND CONTEMPT OF COURT

The only limitation imposed by the Constitution upon the power of pardon is with respect to impeachment. Until very recently it had been generally assumed, however, that the President might not pardon in cases of contempt of court. Nevertheless, President Coolidge, in December, 1923, pardoned one Philip Grossman, of Chicago, who had in 1920 been enjoined by the District Court from selling liquor, and who later (in 1921), for violation of that injunction, had been sentenced to jail for contempt of court. The President's pardon was extended even before Grossman began serving his sentence, and was held illegal and void by the lower federal courts, and Grossman was ordered sent to jail. The Supreme Court, however, upheld the President and ordered Grossman's release.

[*Ex parte Grossman* (1925), 267 U. S. 87; 69 L. Ed. 527, 535-536.]

Original Petition for a writ of habeas corpus to secure release of one committed for contempt of court. . . .

Mr. Chief Justice Taft delivered the opinion of the court:  
. . . The only question raised by the pleadings herein is that of the power of the President to grant the pardon. . . .

The argument for the defendant is that the President's power extends only to offenses against the United States and a contempt of court is not such an offense, that offenses against the United States are not common-law offenses, but can only be created by legislative act, that the President's pardoning power is more limited than that of the King of England at common law, which was a broad prerogative and included contempts against his courts chiefly because the judges thereof were his agents and acted in his name; that the context of the Constitu-

tion shows that the word "offenses" is used in that instrument only to include crimes and misdemeanors triable by jury, and not contempts of the dignity and authority of the Federal courts, and that to construe the pardon clause to include contempts of court would be to violate the fundamental principle of the Constitution in the division of powers between the legislative, executive, and judicial branches, and to take from the Federal courts their independence and the essential means of protecting their dignity and authority. . . .

Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check intrusted to the Executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it. An abuse in pardoning contempts would certainly embarrass courts, but it is questionable how much more it would lessen their effectiveness than a wholesale pardon of other offenses. If we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery. A pardon can only be granted for a contempt fully completed. Neither in this country nor in England can it interfere with the use of coercive measures to enforce a suitor's right. The detrimental effect of excessive pardons of completed contempts would be in the loss of the deterrent influence upon future contempts. It is of the same character as that of the excessive pardons of other offenses. The difference does not justify our reading criminal contempts out of the pardon clause by departing from its ordinary meaning, confirmed by its common-law origin and long years of practice and acquiescence.

If it be said that the President by successive pardons of constantly recurring contempts in particular litigation might deprive a court of power to enforce its orders in a recalcitrant neighborhood, it is enough to observe that such a course is so improbable as to furnish but little basis for argument. Except-

tional cases like this, if to be imagined at all, would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.

The power of a court to protect itself and its usefulness by punishing contemnners is of course necessary, but it is one exercised without many of the guaranties which the Bill of Rights offers to protect the individual against unjust conviction. Is it unreasonable to provide for the possibility that the personal element may sometimes enter into a summary judgment pronounced by a judge who thinks his authority is flouted or denied? May it not be fairly said that in order to avoid possible mistake, undue prejudice or needless severity, the chance of pardon should exist at least as much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial? The pardoning by the President of criminal contempts has been practised more than three quarters of a century, and no abuses during all that time developed sufficiently to invoke a test in the Federal courts of its validity.

It goes without saying that nowhere is there a more earnest will to maintain the independence of Federal courts and the preservation of every legitimate safeguard of their effectiveness afforded by the Constitution than in this court. But the qualified independence which they fortunately enjoy is not likely to be permanently strengthened by ignoring precedent and practice and minimizing the importance of the co-ordinating checks and balances of the Constitution.

The rule is made absolute, and the petitioner is discharged.

## CHAPTER VII

### THE CABINET

#### 41. ORIGIN OF THE CABINET

Nowhere in the Constitution is there any mention of a Cabinet or of any collective body to advise the President, nor has any law ever been enacted prescribing the organization or even the existence of such a body. It is evident, therefore, that the President may seek advice from whomsoever he will, and that these advisers meet together as a group whenever he desires. One of the earliest, if not actually the first, of such meetings, was held, in response to Washington's request, on April 11, 1791, and was attended by Jefferson (Secretary of State), Hamilton (Secretary of the Treasury), Knox (Secretary of War), and Adams (Vice President). Later meetings were attended also by the Attorney General (who did not, however, rank with the Secretaries as the head of an executive department until 1870); but the Vice President (Adams) apparently was not again present. Out of this beginning developed the institution known as the Cabinet.

##### a. Call for First Cabinet Meeting

[*Writings of George Washington* (Ford ed., published by G. P. Putnam's Sons), vol. XII, pp. 34-35.]

#### TO THE SECRETARIES OF THE DEPARTMENTS OF STATE, TREASURY, AND WAR.

Mount Vernon, 4 April, 1791.

GENTLEMEN,

As the public service may require, that communications should be made to me during my absence from the seat of government by the most direct conveyances, and as, in the event of any very extraordinary occurrence, it will be necessary to know at what time I may be found in any particular place, I have to inform you, that, unless the progress of my journey to Savannah is retarded by unforeseen interruptions, it will be regulated, including days of halt, in the following manner. [Here follow details of his travel plans.] . . .

After thus explaining to you, as far as I am able at present, the direction and probable progress of my journey, I have to express my wish, if any serious and important cases (of which



the probability is but too strong) should arise during my absence, that the Secretaries for the Departments of State, Treasury and War, may hold consultations thereon, to determine whether they are of such a nature as to demand my personal attendance at the seat of government; and, should they be so considered, I will return immediately from any place at which the information may reach me. Or should they determine, that measures, relevant to the case, may be legally and properly pursued without the immediate agency of the President, I will approve and ratify the measures, which may be conformed to such determination.

Presuming that the Vice-President will have left the seat of government for Boston, I have not requested his opinion to be taken on the supposed emergency; should it be otherwise, I wish *him* also to be consulted. I am, Gentlemen, your most obedient servant.

#### b. Formation of the President's Cabinet

[Short, *The Development of National Administrative Organization in the United States* (Washington: Institute for Government Research), pp. 105-110.]

The origin of the President's Cabinet has been so clearly revealed by two comparatively recent writers, Mr. H. B. Learned and Miss Mary L. Hinsdale, that no attempt will be made here to describe in detail the formation of that important institution. The chief significance of the Cabinet, with respect to the subject of administrative organization, lies in the fact that, from its very beginning, it was composed of the heads of the great administrative departments. "When Congress in 1789 provided by law for the establishment of three administrative Secretaryships and an officer to be known as the Attorney-General," says Learned, "it was arranging machinery by means of which the chief magistrate might surround himself with four expert assistants, men qualified in foreign affairs, in finance, in army organization, and in the law." Numerous statements were made, during the course of the debates on the establishment of the executive departments in 1789, which give adequate ground for inferring that at least a considerable number of the members of Congress clearly recognized, in setting up three departments in charge of secretaries responsible to the President, that they were surrounding the Chief Executive with a group of competent and experienced assistants.

That President Washington, from the very outset of his ad-

ministration, regarded the heads of departments as his assistants, is evidenced by the following, taken from a letter written by him to Count De Moustier on May 25, 1789: "The impossibility that one man should be able to perform all the great business of the state, I take to have been the reason for instituting the great departments, and appointing officers therein, to assist the supreme magistrate in discharging the duties of his trust." Washington took advantage of his constitutional prerogative to "require the opinion, in writing of the principal officer in each of the executive departments" very soon after he took office, Secretary of State Jefferson alone furnishing at least a dozen written opinions during the year 1790. Although the President did not confine himself entirely to securing the opinion of the heads of departments, asking for the advice of Vice President Adams and Chief Justice Jay on several occasions, yet the personal relationship necessarily existing between the Chief Executive and the principal administrative officers, in the discharge of their duties, tended quite naturally toward bringing them together into an advisory or cabinet council.

Miss Hinsdale, in attempting to formulate the principle by which the members of the Cabinet were set apart from other advisers to the President, says: "Obviously the inner council was built upon the plan that had been before the Federal Convention, having for its basis the administrative departments, but including the chiefs of all the branches of the Government. How soon Washington drew a line in his own mind across the larger group, there is nothing to show; the Cabinet meeting marks the visible separation. There is some slight ground for believing that in choosing his judicial adviser, he hesitated between the Chief Justice and the much humbler Attorney General, who had not been named in the convention. As for the rule by which the line was drawn,—there can be no doubt that it was removability by the President, a conclusion that is borne out by the whole history of the Cabinet."

Two events occurred during Washington's administration which had the effect of making the President more dependent upon his personal assistants—the heads of departments and the Attorney General. In the first place, the President's attempt to advise with the Senate in the matter of a proposed treaty with the Southern Indians failed, and the ineffectiveness of such procedure was so clearly demonstrated that the attempt was never repeated. The second event was the refusal of the Supreme Court to respond to a request from the President for their advice

with regard to the legal questions which arose in connection with the treaties of the United States with European nations. The heads of departments, on the other hand, were further led to regard themselves as essentially, and in most respects, belonging to the Executive by the action of the House of Representatives in refusing, on two occasions, to permit the department secretaries to report in person to that body.

The first occasion when the President's personal advisers met together, as a group, to discuss important executive and administrative problems, of which record has been found, occurred in 1791. In accordance with the suggestion of President Washington, who had left Philadelphia for a tour in the South, the Vice President and the three secretaries of departments met on April 11 of that year. A careful report of this meeting, at which time such subjects as loans, commerce, foreign relations, appointments, and frontier troubles with the Indians were considered, was submitted to the President by Secretary of State Jefferson. This first meeting of the Cabinet was the only occasion on which the Vice President was invited to attend. No conclusive evidence is available as to why the President did not include the Attorney General in this first meeting of his advisers. Jefferson, in his record of later meetings of the Cabinet, indicates that the Attorney General was regularly a member of the group, while Monroe, writing to a member of the House of Representatives on December 31, 1816, with respect to the duties and emoluments of the Attorney General, said: "The Attorney General has been always, since the adoption of our Government, a member of the Executive Council, or Cabinet. . . . His duties in attending the Cabinet deliberations are equal to those of any other member."

The critical year of 1793, calling for the solution of important questions of policy, led to frequent meetings of the President's advisers, the most notable of which was that of April 19, when a decision was reached with respect to the issuance of a proclamation of neutrality. This frequency of meeting, together with the importance of the decisions reached therein, says Learned, "brought the Cabinet for the first time forcibly into popular view as a working body." It was also at this time that the term cabinet was first used to designate the President's advisory council. No reference was made to the Cabinet in the debates of Congress until April 25, 1798, when Livingston, in a speech opposing the creation of a Navy Department in charge of a Secretary, referred to the Cabinet as "the great council of the

nation." Although frequent references have been made, since 1798, to the President's Cabinet, especially in congressional debates, in presidential messages, and in court decisions, the existence of that institution was not recognized in the statute law of the United States until February 26, 1907, when an act was passed providing for an increase in the salaries of the heads of executive departments, who were designated as "members of the President's Cabinet." The objection was raised, in the debate on this measure, that the President's Cabinet had no statutory existence, but the reference to the Cabinet was retained, as designating a well-known and functioning governmental institution.

Thus, the Cabinet, constituting an advisory council to the President and composed of the principal administrative officers of the national government, was the creation of President Washington. The practice of calling together the heads of departments to discuss important questions of governmental policy and to advise the President, became in the course of time a settled custom. Hamilton, in a vigorous declaration aimed at President Adams' unfortunate experiences with his cabinet advisers, thus expressed, in a clear and forceful manner, the theory upon which the Cabinet, as an integral part of the national government, must rest: "A President is not bound to conform to the advice of his ministers. He is even under no positive injunction to ask or require it. But the Constitution presumes he will consult them; and the genius of our government and the public good recommend the practice. As the President nominates his ministers, and may displace them when he pleases, it must be his own fault if he be not surrounded by men who, for ability and integrity, deserve his confidence. And if his ministers are of this character, the consulting of them will always be likely to be useful to himself and to the state."

Jefferson, in a letter to William Short written on June 12, 1807, referring to the customary practice of consultation with his "coadjutors," said: "For our government although in theory subject to be directed by the unadvised will of the President, is, and from its origin has been, a very different thing in practice. The minor business in each department is done by the head of the department on consultation with the President alone; but all matters of importance or difficulty are submitted to all the heads of departments composing the Cabinet. Sometimes, by the President's consulting them separately and successively, as they happen to call on him, but in the gravest cases calling

them together, discussing the subject maturely, and finally taking the vote, on which the President counts himself but as one. So that in all important cases the Executive is in fact a directory, which certainly the President might control; but of this there was never an example either in the first or the present administration." Again, in a letter to a friend written in 1823, Jefferson said that we had "fallen on the happiest of all modes of constituting the executive, that of easing and aiding our President, by permitting him to choose Secretaries of State, of Finance, of War, and of the Navy, with whom he may advise, either separately or all together, and remedy their decisions by adopting or controlling their opinions at his discretion. . . ."

A very concise and clear exposition of the place occupied by the President's Cabinet in the governmental system of the United States, is that given by Professor Burgess in his work on Political Science and Constitutional Law: "In the exercise of his powers the President may ask the advice, if he will, of the heads of the executive departments, but he is not required to do so by the Constitution. The words of the Constitution are that the President 'may require the opinion, in writing, of the principal officers in each of the executive departments, upon any subject relating to the duties of their respective offices.' These officers are not specifically mentioned in any other part of the Constitution. They certainly have no *collegiate* existence under the Constitution. The President may, if he chooses, consult them as a body, unless they themselves object. Should they object, he could not point to any specific clause in the Constitution which requires such an organization, or which authorizes him to require opinions in such a form. He might, of course, dismiss an officer who should refuse to take part in the collegiate deliberations. The Constitution makes the President the only bond between the executive departments. The Congress has no power to create any other bond. What we call the Cabinet is, therefore, a purely voluntary, extra-legal association of the heads of the executive departments with the President, and whose resolutions do not legally bind the President in the slightest degree. They form a privy council, but not a ministry."

## 42. CONFIRMATION OF CABINET APPOINTMENTS

Although the Constitution and the laws require senatorial confirmation for important appointments, it has become an accepted principle that the President should ordinarily have complete freedom in selecting his immediate advisers. Cabinet appointments are therefore confirmed, usually with-

out opposition and as a matter of course. However, when President Coolidge in 1925 nominated Charles B. Warren, who had served as Ambassador to Japan and Mexico, to the office of Attorney General, the Senate refused to confirm, first by a tie vote of 40-40, unbroken through the absence of Vice-President Dawes, and changed on reconsideration to 39-41. President Coolidge promptly resubmitted Mr. Warren's name, but again the Senate refused to confirm by a still larger majority (39-46). The President, having also failed in his purpose to give Mr. Warren a recess appointment, thereupon nominated John G. Sargent, a comparatively unknown lawyer from Vermont, who was immediately confirmed without opposition.

### a. Debate in Senate

[*Congressional Record*, vol. 67, pp. 18-19, 31-32, 74-75, 83-84, 254-258.]

### NOMINATION OF CHARLES BEECHER WARREN

The Senate, in open executive session, resumed the consideration of the nomination of Charles Beecher Warren, of Michigan, to be Attorney General of the United States. . . .

MR. WALSH. Mr. President, I subscribe to the doctrine that under all ordinary circumstances the nominations of the President of the United States for members of the Cabinet should be confirmed by the Senate without delay and that opposition of a political or factional character ought to be discountenanced. The President is charged by the Constitution to take care that the laws be faithfully executed, and he ought to be given the greatest liberty possible in the selection of those who immediately under him are to carry out his policies in accordance with the laws of Congress. Nevertheless the founders of our Government, the framers of our Constitution, deemed it unwise to trust unrestrictedly to any one man the appointment of any of the principal officers of the Government, and accordingly provided that in the case of all nominations made by the President of the United States confirmation by the Senate should be necessary except in the case of such inferior officers as Congress might provide should be appointed by the President alone, by the courts, or by the heads of the departments. The responsibility, accordingly, for the appointment of all the Federal officers where confirmation is necessary rests upon this body jointly with the President of the United States. Whether equally or in lesser degree it is unnecessary to canvass. It is indisputable that we share that responsibility and that we must assume it, at least in part.

All will agree that if a nominee, even for a Cabinet position, is lacking in moral character, he should be rejected by the Senate; but it is contended by some that otherwise his confirmation should follow as a matter of course. I can not think so. A man may have some serious blemishes in the matter of his private character and still be an able administrator and a courageous and patriotic official. Instances of that character will readily occur to any student of history. On the other hand, a man may have led the most exemplary life and yet be totally unfit for the duties and responsibilities of high official position. It is unwise, even if it were possible, accordingly to attempt to lay down any general rule which ought to govern the Senate in its action upon nominations for public office.

The nomination before us warrants, and as I think imperatively demands, a departure from the general rule. In the active propaganda which has been carried on through the press to break down or wear down the opposition to the nomination of Mr. Warren it has been repeatedly asserted that there is no instance on record of the rejection by the Senate of the nomination for the head of any of the departments. That is not correct. So good a man as Roger B. Taney, afterwards Chief Justice of the Supreme Court of the United States, was rejected by the Senate as a nominee for Secretary of the Treasury by Andrew Jackson. The illustrious Caleb Cushing, afterwards Attorney General of the United States, and whose career is a part of the glory of that office, was rejected for Secretary of the Treasury during the administration of President Tyler. Two other nominations for Cabinet positions sent to the Senate by that President were likewise rejected—that of James M. Porter, of Pennsylvania, nominated for Secretary of War, and David Henshaw, of Massachusetts, for Secretary of the Navy. During the administration of President Johnson the nomination of Henry Stanbery, of Ohio, for Attorney General, was rejected by the Senate. . . .

Three times, Mr. President, within the past six years the office of Attorney General has been filled, as in the instance of the present nominee, by men who were named for the place not as a reward for eminent success at the bar or brilliant attainments in the law but as a reward for active political service. In two of these instances the career has not shed any particular luster upon the office nor any particular credit upon the appointing power, whatever may be said with reference to the Senate in confirming them. It is neither exaggeration nor hyperbole to assert that the

result has approached disaster, so far as the public interests are concerned. What may happen in the case of the confirmation of the nomination of Mr. Warren we can only speculate, but, in the language of the orator of the Revolution, "I know no way of judging of the future but by the past."

Mr. Warren, it is no injustice, I think, to say, has no reputation whatever as a lawyer. The attachés of the Supreme Court of the United States apparently have no recollection of ever having seen him before that tribunal in the presentation of a case. It is said in his behalf, Mr. President, that he represented the United States in two important international arbitrations—the Bering Sea fur-seal arbitration and the North Atlantic fisheries case. He did, indeed, appear on the record in the fur-seal arbitration, but we were represented in that proceeding by Mr. Don M. Dickinson, of the city of Detroit, Mich., and, as my information is, Mr. Warren, at that time being 26 years of age, was a clerk in his office and went on the record with him. He did, however, make an argument in the North Atlantic fisheries case at The Hague, and I must say, to his entire credit, that the argument was lawyerlike in character, and indicated that Mr. Warren is a man of ability; but, as I have stated, I think I do him no injustice whatever to say that he has no reputation whatever as a lawyer.

I think that he ought not to be made Attorney General not only because he is not eminent in the profession but chiefly because for years he was a representative in his State of the Sugar Trust, one of the most offensive and oppressive trusts with which the American people have unfortunately been familiar in the present and past generations.

In the course of the efforts of that organization to monopolize the supply of sugar of the American people it first secured control of the Atlantic coast refineries, refining raw sugar imported from Cuba and other places. Having practically accomplished the consolidation of all of the competing companies engaged in the refining business, it encountered the opposition of the beet-sugar producers. Then, in the early part of the present century, it set out to secure control of all the beet-sugar companies.

At that time there were in the State of Michigan a half dozen small beet-sugar companies, each competing with the others and entirely independent. Prosecuting its purpose, the Sugar Trust sought to secure control of these various companies. One of them, the Peninsula Sugar Co., was, I believe, organized by Mr. Warren; at least, he owned a considerable amount of stock in



the company as well as some stock in the other companies to which I have adverted. Mr. Havemeyer, who was then the dominant intellect of the Sugar Trust, was desirous of getting control of those companies, and Mr. Warren acted as his agent in securing that control. He went out and bought up enough of the stock of the independent beet-sugar companies of the State of Michigan to control them, taking the conveyance in his own name but using the money of Mr. Havemeyer and his associates and holding the stock in trust for them.

Subsequently they organized the Michigan Sugar Co., of which Mr. Warren became the president and remained president down to the 25th of January last, as my information is. In the same way the stock of the local companies was turned in in exchange for stock in the Michigan Sugar Co., the stock being issued again in the name of Mr. Warren and being held by him for some time, the trust having acquired 46 per cent of the stock of the Michigan Sugar Co. Thereafter, in the year 1910, the Government of the United States began suit under the Sherman Antitrust Act to dissolve the Sugar Trust, making the Michigan Sugar Co., as well as Mr. Warren individually, defendants in that action, and charging they had both participated in the conspiracy to monopolize the beet-sugar industry of the country. . . .

Furthermore, Mr. President, the Michigan Beet Sugar Co. is now charged by the Federal Trade Commission with being engaged in another conspiracy to restrain trade. It is charged that the Michigan Sugar Co. and a large number of other companies have entered into an unlawful contract with the Larrowe Milling Co. under which the Larrowe Milling Co. becomes the agent of all these corporations in the sale and disposition of beet pulp, except as to small quantities held for local distribution and consumption. . . .

As is well known, if it should be found by the commission that such unfair methods have been employed an order will be issued, commanding the various parties to desist from that method of procedure; they may then appeal from the order of the commission to the circuit court of appeals, and it then becomes the duty of the Attorney General of the United States to represent the Government. On such an appeal, therefore, Mr. Warren, if his nomination shall be confirmed, will be called upon to represent the Government of the United States in proceedings in which the Michigan Sugar Co. is a party defendant.

But, Mr. President, that is not all. There are now before the Department of Justice a long list of cases referred to that de-

partment by the Federal Trade Commission for appropriate proceedings under the various laws enacted by Congress concerning the restraint of trade and commerce. I shall not take the time now to refer in detail to those cases; but let me refer to the fact that the Federal Trade Commission some time ago found that the Aluminum Trust, at the head of which is the present Secretary of the Treasury—I say at its head; he was at the head of it before he became Secretary of the Treasury, and presumably still holds his interest in the organization—has not only been guilty of monopolizing trade and commerce in violation of the Sherman Act, but has actually violated a decree of the court rendered against that organization and is now in contempt of the court. Just imagine the Aluminum Co. of America being brought to book by Charles B. Warren for having violated the Sherman Antitrust Act!

Bear in mind that that case was referred by the Federal Trade Commission to the Attorney General, and the late Attorney General, Mr. Stone, practically approved the findings of the Federal Trade Commission and declared that the Aluminum Trust, as a matter of fact, was in contempt of court for a violation of the decree against it.

[Then follows the text of the letter from Attorney General Stone to the Chairman of the Federal Trade Commission.]

Mr. President, if this nomination is confirmed by the Senate of the United States, there is just one consistent thing for the Congress of the United States to do, and that is to wipe the Sherman Act off the statute books, to repeal it forthwith. Confirm this nomination and you might as well hang out a sign that for the period of the life of this administration the Sherman Act is suspended. Confirm this nomination and you extend an invitation to every plundering monopoly in the country to extend and fasten its tentacles upon the American household.

I can not believe that Senators can consider this record and think that they discharge their duty in voting for the nomination of Charles B. Warren for Attorney General of the United States.

. . . . .

MR. CUMMINS. Mr. President, I have an advantage in presenting this matter that is not enjoyed by every Member of the Senate. I have known Mr. Warren for more than 20 years; I hold him in such high esteem as a man and I have such admiration for his brilliant qualities of mind that it is a peculiar pleas-

ure for me to attempt, at least, to respond to the charges made by the Senator from Montana.

Mr. WARREN, since the happenings that were cited by the Senator from Montana, has been twice confirmed by the Senate for high and responsible office. I am not sure that I am correct in my recollections, but I think I have heard the Senator from Montana say, either in the very able speech that he made on Saturday or in the consideration of this subject before the committee, that if Mr. Warren had been nominated for the position of ambassador to a foreign country, if he had been nominated for Secretary of State, if he had been nominated for any other office than that of Attorney General, he would have presented no objection to his confirmation. I should like to be sure that I quote the Senator from Montana correctly when I say that.

MR. WALSH. The Senator has quoted me with substantial accuracy.

MR. CUMMINS. Upon that assumption, there lies no objection to this confirmation by reason of the character of the nominee; there lies no objection by reason of any infirmities, if I may so call them, of his mind or his heart. The objection comes to this—and it was clearly stated by the Senator from Montana, to whom I want to pay the compliment of saying that, while I do not always agree with him, I always understand what he says and what he means to impart to the Senate—the objection to Mr. Warren is, projecting ourselves into the future as best we can, that he would not faithfully execute the laws of the United States and especially that he is unfitted by reason of his experience and associations to enforce what is commonly known as the antitrust law. That narrows the consideration of the subject before this body within very limited bounds, and I shall endeavor just as briefly as I can to examine that objection.

First, let me remark that the objection implies a very serious disparagement of the profession to which the Senator from Montana belongs and to which he is so great an honor. It implies that because a lawyer has been faithful to one client he will not be faithful to another. There is no escaping the proposition that the Senator from Montana means to say, and I predict the Senator from Missouri [MR. REED] will say, that Mr. Warren will abandon his duty if he becomes Attorney General and will not serve the United States as diligently and as faithfully and as successfully as he has served the clients who heretofore have employed his services.

I want, with all the earnestness that I have, to dissent in the

beginning from that proposition. I intend to examine just what Mr. Warren's connection with the American Sugar Refining Co. and the Michigan Sugar Co. was; but I want to begin by saying that if he is an honest man—and that seems to have been implied in the statement that I have imputed to the Senator from Montana—he will execute the laws of the United States just as faithfully and as diligently and as perfectly as it lies within his power to do so. . . .

Before I proceed, however, to the history of Mr. Warren with regard to the sugar industry in Michigan, I want to confirm the view that has been announced by the Senator from Montana with regard to our duty in this matter. I may not do it in the exact language which he has used, but there is no substantial difference between us with respect to it.

It should be borne in mind throughout the consideration of this nomination that it is for a place among the close, intimate, and confidential advisers of the President; and in my judgment the rule which should be applied in performing the functions of the Senate in connection with such a nomination is not quite the same as the rule which ought to be applied to other officers of the Government whom the President under the Constitution must appoint. We should, of course, insist that the men he selects for his official family are men of high character. That seems not to be disputed here. We should insist that they are men well disposed toward their country and its institutions. That test seems to be fully answered. In addition to all the other services which Mr. Warren has rendered to his country, his work during the war was of the highest order; and if anyone is in doubt with respect to his legal qualifications, his qualifications as a lawyer, I would suggest that he inquire of Gen. Enoch H. Crowder, whose assistant he was during the war. I think we all know that his service in that capacity merits the highest esteem. . . .

We should also insist that these members of Mr. Coolidge's official family have an understanding of public affairs, and we should insist that the execution of the laws can be fairly intrusted to them. That, I think, is the substance of the test announced by the Senator from Montana, and I am entirely satisfied with that announcement.

Further than that, however, we ought not to go. We ought not to deny Mr. Warren confirmation simply because we would not have selected him had the choice been ours. The President has selected him, and we ought to leave the President a free

choice and hold him responsible for the faithful execution of the laws.

[Then follows a defense by Senator Cummins of Mr. Warren's trust connections.] . . .

MR. BAYARD. I am afraid I misunderstood the Senator, and I do not want to be incorrect in making statements hereafter on the record. Am I correct in my recollection that the Senator said in the earlier part of his remarks to-day that if the President saw fit to nominate Mr. Warren or any other Cabinet officer as a member of his official family and secured his confirmation by the Senate thereafter we would hold the President responsible for the shortcomings of Mr. Warren or any other officer in his Cabinet? Am I right in substance?

MR. CUMMINS. I said substantially that; and let me say that the Senator and his party did hold the President responsible for Mr. Daugherty; they did hold him responsible for Mr. Denby.

MR. BAYARD. Oh, yes.

MR. CUMMINS. They did hold him responsible for Mr. Fall. Why not hold him responsible, then, for the other members of his official family?

MR. BAYARD. I think I can answer that now, if the Senator will allow me a moment. Last year, when we undertook to advise the President that the opinion of the Senate was that he should get rid of Mr. Denby, the President very frankly told us that was none of our business. That is all we got out of the present President. He is in for another four years more and wants to start in on the new term of four years with an Attorney General against whom we shall have nothing to say. That is the President's point of view. If we confirm Mr. Warren our lips are sealed, according to President Coolidge's stand on this matter; that is, if we shall once confirm an officer of his Cabinet, from that time on we shall say nothing about him.

MR. CUMMINS. The Senator does not understand me to say that he is precluded from voting against Mr. Warren. He evidently intends to do so, and I think he has a perfect right to do so.

MR. BAYARD. No; I do not mean that; the Senator misunderstands me. What I mean is this—

MR. CUMMINS. The Senator must mean that. The questions which he has asked me indicate very clearly his attitude toward Mr. Warren.

I think that if Mr. Warren is confirmed and does not enforce the laws of this country, not only against those who violate the antitrust law but those who violate all other laws of the country,

I think the Senator will hold the President responsible; I think he will say that Mr. Coolidge is a very poor President, and possibly he will say that anyway. But I have not said that we ought to confirm any man who may be proposed for a Cabinet office merely because he is a member of the official family of the President; I have not said that. I tried to repeat with a variety of phrase the view presented by the Senator from Montana.

MR. BAYARD. The Senator has misunderstood me. I understood the Senator, in substance, to say that if we should confirm this nominee and thereafter Mr. Warren should be derelict in his duty in any respect—I do not care what—that we would then have to complain to the President or could criticize the President or, as the Senator puts it, hold him responsible. That is the substance of it.

MR. CUMMINS. I think there is a fine sense in which the President is held responsible for the performance of the duties of the officers composing his Cabinet; I think that is so; but that does not relieve such officers of the criticism which would fall upon them if they failed to perform their duties. I can not quite catch the nice and delicate view the Senator from Delaware is trying to express.

MR. BAYARD. I will repeat it, then, in another form. Last year we told the present President that the Senate was of the opinion that he ought to dismiss Mr. Denby because of certain things Mr. Denby had done. The President told us very frankly that was none of our business; that was his business alone, and that a Cabinet officer having once been confirmed, the President had the right to keep him in office so long as he saw fit and so long as the President was in office himself; that was the substance of what we got from the President. Over and above that, with his knowledge of what Mr. Daugherty was doing he kept Mr. Daugherty in office, although we were "showing up" Mr. Daugherty; and so it is in evidence on the part of the President as to how he will conduct himself with a positive knowledge of the acts of his Cabinet officers.

The point I want to bring out in regard to what the Senator from Iowa said in the beginning of his remarks is this: He said we would hold the President responsible for the acts of his Cabinet officers.

MR. CUMMINS. The Senator and his party did hold the President responsible during the entire campaign last fall. Holding the President responsible for the conduct of Mr. Denby and Daugherty and of Mr. Fall, all of whom were appointees of the

former President, constituted the greater part of their campaign. Is not that true?

MR. BAYARD. No; I do not think so. I think the campaign went off on another matter entirely.

MR. REED of Missouri. Mr. President, if the Senator will pardon me, the plea on the other side was that Mr. Coolidge was a perfectly good and honest man who had inherited these wicked creatures and that he should not be at all blamed.

MR. CUMMINS. We had better not drift into these reminiscences of the campaign. I think that the Senator from Delaware understood me perfectly.

MR. BAYARD. If I did, then I shall go ahead later on and say what I have to say.

MR. CUMMINS. Precisely. I think the President is responsible for his Cabinet in a way in which he is not responsible for the other or general officers of the Government. I understood the Senator from Montana substantially to state that and I was merely trying to agree with the Senator from Montana. If the Senator from Delaware feels that I ought not to agree with him, I will retract my statement.

MR. BAYARD. I did not mean that for a moment.

MR. CUMMINS. No; I know that.

MR. GILLET. Mr. President, I appreciate that the sentiment of this body is that new Senators, like children, should be seen and not heard; but I am a member of the committee which reported this nomination, and I will endeavor by my brevity to try to make some amends for my presumption, although I must admit that during the few days which I have spent here the deepest impression I have received is the different estimate of the value of time here and in the body at the other end of the Capitol. I hope I shall not show that I am already unduly infected by this atmosphere. [Laughter.]

The rejection of the nomination of Mr. Warren is, we all recognize, an extraordinary happening. During a period of over 50 years never has the nomination of a man for a position in the President's Cabinet been rejected. During that time both Republicans and Democrats on the stump have assailed and denounced and reviled and vituperated some of their opponents, compared with which the invective of the Senator from Missouri the other day was but as the cooing of a turtle dove; and yet when the nominations of those same men for Cabinet offices were

subsequently sent to the Senate for confirmation not a word was raised against them and they were confirmed. Why? Because it is, I believe, the general opinion and conviction of the people of this country—and I would have said, until last week, the settled opinion and conviction of this body—that any man nominated by the President to be a member of his official family should be confirmed unless there are against him flagrant charges of incompetency. There are no such charges against Mr. Warren. Those attacking him admit that they would confirm him for any other Cabinet position. Why will they not confirm him for the position of Attorney General? They say it is because from 15 to 25 years ago, as a young man, he was counsel for “trusts” and probably himself acted as a member of what were called “trusts.” That of itself, they do not claim, disqualifies him; but the argument is made that because in those years he acted as counsel for “trusts” he became so affected and so mentally biased and so fixed in his resolution that he could not now efficiently prosecute the law against “trusts.”

I would prefer that Mr. Warren had never had any such connections. I would wish that any lawyer who is presented for Attorney General had never been on anything but the right side of every case he had ever had. I would wish he had never advised any client to do something which a court subsequently held to be illegal; but if we should take that as a test of confirmation, we would shut out a majority of the big lawyers of the country. Big lawyers are attracted to the big cities, when they are employed by big business. Big business during all the early years of this century was trying to adjust itself to the constantly changing interpretations of the trust laws, and every big lawyer who was employed by them, uncertain what the law might be next year, was trying to advise them as he thought was for their interest. The Sugar Trust was not then the object of general contumely that it afterwards became, because those scandals which turned against it the decent sentiment of the country had not then been revealed. But because this lawyer acted for the Sugar Trust and perhaps participated in local trusts as a director and president is he thereby to be shut out forever from public employment against trusts? The only question is, and that is the question which I understand is raised on the other side, Did he thereby become so mentally warped, did his attitude become so biased and so narrow that he can not now properly perform the duties of Attorney General? . . .

Mr. President, I admit that I am myself a good partisan. I



do not pretend that I can approach such questions as this without some bias, and I do not believe that Senators on the other side can, but I will say this, that if four years from now we are punished for our sins with a Democratic President, which to-day looks as improbable as it is undesirable, if that shall come about, I promise that I will vote for the confirmation of any Cabinet officers whose names the Democratic President may send down to the Senate if they have half the fitness Mr. Warren has, even though the whole Republican Party may be against me. . . .

MR. BORAH. Mr. President, it was not my original purpose to take any part in this debate. As chairman of the subcommittee which had to do with passing upon the fitness of Mr. Warren to be Attorney General, I reached a conclusion to the effect that I could not cast my vote for his confirmation. I announced that conclusion and felt that in all probability I could fully discharge my obligations to the situation by simply casting my vote. But as the debate has proceeded and some phases of the controversy have been developed, and for the purpose of helping to complete the record, I have concluded to take a few moments of the time of the Senate to express my views upon some features of the controversy.

I am not very much concerned about the charges and counter-charges of partisanship or of party disloyalty. It would be more fitting to discuss those matters in other bodies than in this, and they will have to be settled in another forum; but there is one feature of the subject which is of concern and which I think ought to be fully considered not only for the present case but for all future time.

The President of the United States is authorized by the Constitution to nominate men for certain public offices, and the Senate of the United States must advise and consent before the appointments take place. The powers of the President with reference to appointments to office are very limited, most circumscribed. His power to appoint obtains only and alone concerning those appointments which are necessary to fill up vacancies that happen during a recess. In this instance before us he has only the power to nominate, and the question arises, What are the duties of a Senator and what is the duty of the Senate in case a Senator or a majority of the Senate have fairly and honestly reached the conclusion that they should not advise and consent?

Is the obligation which rests upon us merely a perfunctory one? Is not the obligation a most exacting one? Have we not

a full share, and an inescapable share, of the responsibility for a strong, a clean, and a patriotic Government?

The argument has been advanced here and elsewhere, and particularly in the able editorial pages of the press, that the Senate ought to yield entirely to the judgment of the President; that we ought to treat the obligation which is imposed upon us by this provision of the Constitution as nothing more than a courteous gesture, and that really no part of the responsibility for this official or for other officials rests upon us; that it rests wholly and exclusively upon the President. Such is not the Constitution. Such is not the obligation we have assumed.

I am frank to admit, Mr. President, that to a marked degree, in practice, that has been the construction of the Constitution. It has arisen very largely out of the fact that all people regardless of party respect the Presidency and all people respect the man who has become President of the United States regardless of which party places him there. Therefore no Senator and no Senate ever challenges an appointment of the President of the United States unless upon most substantial and controlling reasons which appear to them to be guiding and conclusive reasons. In all the long history of nominations by Presidents and the confirmations which have taken place there have been but few controversies in regard to the matter. . . . In my humble opinion if there has been dereliction of duty it has not been on the side of opposing the President but it has been rather a disposition to shirk for ourselves and to put upon the President the sole responsibility, a very large portion of which is upon the Senate, inescapably upon the Senate.

I have no doubt either that things have happened within the last few years which have not only aroused the country, but aroused the Senate to the necessity of reexamining its duty and its obligation with reference to this important part of executive duties devolving upon us. I have no doubt that incidents could be recalled, if it were not unpleasant to do so, which, even if there had never been a precedent before, would be sufficient to justify the Senate in adopting a more rigid and more exacting and more determined rule in regard to their conduct in these matters. It is not a perfunctory duty. It should no longer be considered as such. I agree, however, perfectly with those who say that only upon the most substantial grounds and the most controlling reasons should we oppose a nominee of the President. . . .

Mr. President, if I should be called by chance to the White House to advise the President concerning an appointment com-

ing from my State, what would be my plain duty? If any Senator in this Chamber were called to the White House for the purpose of advising with reference to the appointment of a Federal judge or a district attorney or a United States marshal, what would be his plain duty? If he thought the man unfit, it would be his solemn obligation to so advise the President; and if he did not do so he would either be an intellectual coward or he would be unfit for other reasons not mentionable to advise the President or to represent a State. And now, sir, when the obligation is imposed upon me not only by the confidence which might be reposed by the people whom I represent, but when that obligation is imposed upon me by the Constitution itself and when I have taken an oath to support the Constitution, what is my plain duty when the facts are presented to me and they convince me that Mr. Warren is unfit? It is put up to me by the charter under which and by authority of which we are here. The Constitution imposes upon the President the duty to nominate. It imposes upon me the duty to advise. How shall I advise—honestly and sincerely or in deception and insincerity?

What is my plain duty? It is not a formality. It is not a matter about which I have a right to surrender my opinion. In refusing to treat it as a formality, in refusing to surrender my opinion, I challenge not at all the integrity of mind or purpose of the President of the United States; I challenge not at all his performance of duty as he sees it. I expect him, knowing him as I believe I do, to meet that obligation according to his convictions, and if I do less than meet mine here I shall quickly forfeit the respect of the President and, most of all, my self-respect. . . .

Mr. President, under present circumstances and conditions the Attorney Generalship, to my mind, is the most important office within the nominating power of the President of the United States, with the possible exception of the Chief Justiceship of the Supreme Court. That would not always be true. That has not always been true. But in the circumstances which now confront us and with which we have to deal there is no more important office in the nominating power of the President than the Attorney Generalship of this Government. He is to stand forth to enforce the laws and to administer justice through a vast machinery for 110,000,000 people. In view of the conditions which now confront the country, no more burdensome task, no task requiring greater breadth, greater courage, and finer character, can be conceived than are required in the discharge of

the duties of that office. It is not, in other words, an office which is calculated to lull Senators into being disregarding of their duty in this instance, and that is particularly true when we look over what has happened in the last few years. Past events call to us to be vigilant and to assume our full share of responsibility.

Without going back to discuss individuals, I venture to say that there is no Senator here but has felt humiliated more than once and discomfited many times by reason of conditions which have prevailed in that office for the last 10 or 15 years. There have been exceptions. The exceptions are well known. Therefore, my generalization should not be regarded as an indiscriminate attack; but under the conditions which confront us the country expects us to meet, and we ought to be impelled by our own sense of duty to meet in the fullest measure our part of the obligation incident to the filling of this office.

There are those who believe that Mr. Warren is well fitted for the position, and they will undoubtedly vote for him for that reason. I have no quarrel with them. The only man with whom I quarrel is the man who, while thinking Mr. Warren unfit, yet would surrender his judgment when it comes to the vote, or those who tell us it is none of our concern who fills these positions. . . .

#### b. Statement of President Coolidge

[*N. Y. Times*, Mar. 15, 1925.]

The White House.

Notwithstanding various reports and rumors, the President is making every possible effort to secure the confirmation of Mr. Warren.

As the time is very short and to accommodate the Senate he has consulted certain men and certain Senators as to what course should be pursued in case Mr. Warren is not confirmed. He has decided on no other appointment. He will offer him a recess appointment.

He hopes, however, that the unbroken practice of three generations of permitting the President to choose his own Cabinet will not now be changed and that the opposition to Mr. Warren, upon further consideration, will be withdrawn in order that the country may have the benefit of his excellent qualities and the President may be unhampered in choosing his own methods of executing the laws.

March 14, 1925.

## c. Coolidge-Warren Correspondence

[*N. Y. Times*, Mar. 18, 1925.]

THE WHITE HOUSE,

Washington,  
March 16, 1925.

My Dear Mr. Warren:

As already indicated by me, in case there is a vacancy in the office of Attorney General after the adjournment of the Senate I shall offer you a recess appointment to that office. This offer is made, in the first place, as a testimony to the unshaken confidence which I have in you, and, in the second place, because I believe you are qualified to conduct that office for the public welfare.

I wish to express my great regret that any action of mine should have brought you into a political controversy. My regret is all the more keen because you made patriotic response at a great deal of personal sacrifice, when I sought you out without any action on your part and asked you again to enter the public service of your country, in which on several previous occasions you had already attained to great eminence. This disappointment is only modified by the fact that from those who have refused confirmation come the strongest assertions that they would gladly approve you for any other position of trust and responsibility.

With kindest regards and deepest appreciation, I am, very truly yours,

CALVIN COOLIDGE.

Hon. Charles B. Warren,  
Detroit, Mich.

THE WHITE HOUSE,

Washington,  
March 17, 1925.

Dear Mr. President:

Your confidence in me was deeply appreciated when you evidenced it by tendering me so important a place in your Cabinet. I am again indebted to you for your renewed expressions of confidence in your note of March 16 proposing to tender me a recess appointment as Attorney General.

I shall always like to remember that the political controversy which has arisen concerning this position has not in the least

affected your faith in me, and I have been apprised that those who know me fully share in your belief.

Had I not known that I could serve you and the Government with all my powers, whatever they may be, I naturally would not have accepted your offer of the position.

But I am not willing to have prolonged a political controversy that might lessen your opportunities for full usefulness to the nation, and possibly interfere with your making wholly effective your policies.

I cannot, therefore, in fairness to you and the Republican Party refrain from declining your offer of a recess appointment, and I hope that you will make another nomination for confirmation.

I am, my dear Mr. President, faithfully yours,

CHARLES B. WARREN.

The President, the White House.

### 43. REMOVAL OF CABINET MEMBERS

President Taft in 1912, and President Wilson in 1915 set aside certain public lands in California and Wyoming as naval oil reserves, and Congress by an act of June 4, 1920, placed these reserves (known respectively as Elk Hills and Teapot Dome) under the control of the Secretary of the Navy. President Harding, by an executive order of May 31, 1921, transferred the administration of these regions to the Secretary of the Interior, and thereupon Secretary of the Interior Fall and Secretary of the Navy Denby leased these lands to the Sinclair and Doheny oil companies under circumstances that gave rise to suspicion of fraud and corruption. Secretary Fall resigned from the Cabinet in 1922, and later there was a prolonged investigation of the whole transaction by a Senate committee. Following the revelations of this committee, the Senate debated at length and on February 11, 1924, adopted by a vote of 47-34, a resolution demanding the removal of Secretary Denby. This action raised the question of the right and propriety of the Senate in thus attempting to influence the President with respect to his Cabinet.

#### a. Senate Resolution of February 11, 1924

[*Congressional Record*, vol. 65, p. 2245.]

Whereas the United States Senate did on January 31, 1924, by a unanimous vote adopt Senate Joint Resolution No. 54, to procure the annulment of certain leases in the naval oil reserves of the United States; and

Whereas the said resolution, among other things, declared as follows:

“Whereas it appears from evidence taken by the Committee

on Public Lands and Surveys of the United States Senate that certain lease of naval reserve No. 3, in the State of Wyoming, bearing date April 7, 1922, made in form by the Government of the United States, through Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy, as lessor, to the Mammoth Oil Co., as lessee, and that certain contract between the Government of the United States and the Pan American Petroleum & Transport Co., dated April 25, 1922, signed by Edward C. Finney, Acting Secretary of the Interior, and Edwin Denby, Secretary of the Navy, relating, among other things, to the construction of oil tanks at Pearl Harbor, Territory of Hawaii, and that certain lease of naval reserve No. 1, in the State of California, bearing date December 11, 1922, made in form by the Government of the United States through Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy, as lessor, to the Pan American Petroleum Co., as lessee, were executed under circumstances indicating fraud and corruption; and

“Whereas the said leases and contract were entered into without authority on the part of the officers purporting to act in the execution of the same for the United States and in violation of the laws of Congress; and

“Whereas such leases and contract were made in defiance of the settled policy of the Government, adhered to through three successive administrations, to maintain in the ground a great reserve supply of oil adequate to the needs of the Navy in any emergency threatening the national security”: Therefore be it

*Resolved*, That it is the sense of the United States Senate that the President of the United States immediately request the resignation of Edwin Denby as Secretary of the Navy.

#### b. Senate Debate on Denby Resolution

[*Congressional Record*, vol. 65, pp. 2072-2074, 2231-2232.]

MR. BORAH. Mr. President, I shall be comparatively brief, I trust, in stating my position in regard to the pending resolution. I am unable to support it. The resolution before us has reference to Mr. Denby alone, undoubtedly to be followed by other resolutions of a similar nature with reference to other public officers. I shall not stand in the way by vote of any investigation of any public official concerning whom a resolution may be introduced if there are any facts to support an

investigation. But I have some views with reference to the manner in which we should deal with this matter, which views are controlling. I am perfectly aware that just at this particular time, under the dreadful revealments which have been made and a very just aroused feeling which obtains throughout the country, the view which I entertain will not be regarded, perhaps, as coming up to the full measure of duty at this time. But I must be controlled by the plain fundamental provisions of our Constitution and depend upon time to justify my position. Permanent good and substantial results are only accomplished in matters like these by pursuing lawful and constitutional methods.

Several views have been taken of Mr. Denby's conduct. The view which has been advanced so often that he is incompetent, that he actually did not know what was going on, that he is practically, when we interpret it in its full logic, *non compos mentis*, does not appeal to me at all. It is indeed not true. Any one who knows Mr. Denby knows that he is entirely responsible for what he does. He is a most practical business man and of large and long public experience. He is entirely responsible.

I do not accept the view, Mr. President, with reference to others who were connected with this matter that they did not know what they were doing. There are, in my opinion, just two rules by which we can gauge Mr. Denby's conduct. First, that the man candidly believed that he had the legal power to do what he did, and that he thought it was in the public interest, or that he was a part and parcel of an organized conspiracy to despoil the Government of its great natural resources. Mr. Denby could not have occupied the place he did with reference to this transaction and not have been sufficiently informed to know what was to be the result of this action. He might have believed that the statute which he construed before the committee in May, 1922, was legally ample for all that he was doing; but if we take the view that he did not know or did not believe, in other words, that it was legally ample, and he was doing his duty, then we must go, in my judgment, the full length of associating him with those who are claimed to have acted from wholly illegal motives.

I am going to assume, therefore, for the sake of this argument, that Mr. Denby did know what he was doing; and I am going to assume, furthermore, for the sake of the argument, that he was guilty of the transaction in the fullest sense of the term. I do that not because it necessarily expresses my view in regard to



the matter, one way or the other, but for the reason that, even assuming that he is entirely guilty, my vote must be the same with reference to this resolution.

There is only one punishment sufficient for Mr. Denby, only one measure which will be efficient, and which will fit the offense, and that is, not a mere dismissal from office, but an arraignment before the proper tribunal, a trial and ejection from office, carrying the stamp which impeachment and conviction would place upon him for all time. If guilty at all, he is guilty of a most heinous offense, one which is thoroughly within the law of impeachment, and one for which impeachment should be had. There is no other way to mete out the punishment justly due.

In my opinion, Mr. President, if Mr. Denby is guilty as charged by the Senator from Missouri [MR. REED], as charged by the Senator from Montana [MR. WALSH], and by other Senators who have spoken upon this matter, if he is in any sense culpable as presented here, a mere dismissal from office would be trifling with the subject. It would not satisfy the country, and justly so; it would not satisfy justice; it would not be at all commensurate with the performance of our duties here as Senators. If a man may be guilty as charged here upon the floor of joining in secrecy and with those who were moved by wrongful motives, for the purpose of despoiling the Government of its property, and may be permitted to go with nothing more than a dismissal from office, to my mind, it would be wholly inadequate and impotent in the way of the performance of our duty.

But that is not all, Mr. President. In my opinion, impeachment is the only way by which we can lawfully and constitutionally proceed in this matter. It is the constitutional way; it is the effective way; it is the drastic way; and it is the way by which we can mete out the punishment for this offense if it has been committed, and in no other. . . .

Mr. President, we come now to the mere question of dismissal for said incompetency. I am equally certain upon that point, for this reason: The right of dismissal belongs alone to the President of the United States. Under the Constitution, as has been determined many times, we have nothing to do with the appointed officer after he is appointed. We have the right to advise and consent with reference to the appointment; but, after the appointment is made, whether the President shall hold him there or dismiss him is a matter exclusively for the President to determine. I think that is far more than what has been referred

to here to-day as a quibble. I think it is an essential principle of constitutional government, an essential principle with reference to the division of powers in the Government. As Mr. Madison once said, "It is an essential principle for the preservation of liberty under our form of government."

The President of the United States is made solely responsible for the execution of our laws. As Mr. Madison so well said in the great debate early in our history, so long as the President is charged with the execution of the laws he should be neither hampered nor embarrassed with reference to the dismissal or retention of officers during the time they are permitted to hold office under the law, and that is an essential principle of our division of powers under the Government. When that great debate took place—which Mr. Evarts once said, perhaps the greatest debate that was ever held in the Congress upon a constitutional question—in which Mr. Madison took part, they regarded it as vital. After a long discussion it was settled that so far as the Congress or the Senate were concerned they had nothing whatever to do with the dismissal of a public officer; that that rested alone with the Executive; that he should not be embarrassed or hampered in this action by an attempt upon the part of the Senate to control him.

That remained the policy of our Government practically down until the passage of the tenure of office act, I think in 1867—in my judgment one of the most vicious laws which was ever passed by the Congress—in which the Congress undertook to control the question of appointment and retention in office upon the part of the President. That act was finally modified in 1869 so as to give the President the power of suspension during a certain length of time until the Congress should come in. I have always believed that the act was unconstitutional, although it was never actually tested in the courts. Finally, when Grant came to be President, in his first message to Congress he insisted that that act should be repealed; that it was an attempt to interfere with the power of the President in the faithful discharge of his duties; that the President was not responsible to the Congress, not responsible to the Senate for the execution of the laws or for the retention of his officers; but was responsible alone to the people, to whom he must give an account of his stewardship, the same as must the Congress. There was opposition, however, to the repeal. Finally, when Mr. Cleveland came to be President the matter came up for final test and decision. While it is conceded here, I presume, that, technically speaking,

the power does belong to the President, yet it is claimed that we may pass this resolution in the hope that it will accomplish through moral processes that which we can not accomplish, and have no right to undertake to accomplish, through legal processes.

Of course, we are passing this resolution upon the theory and in the hope that the President of the United States will accede to our resolution and dismiss Mr. Denby from office. If that be true, and if that precedent is established, it will be in the face of the Constitution, which makes the President the sole guardian of the agents upon whom he must depend to execute the laws.

I should regard it as a calamity almost equal to the calamity with which we are dealing if, through the power of the Senate, we should establish here the precedent of saying to the President whom he should dismiss from office; and if we have a weak President, a President who will yield to the Congress in this respect, through public feeling, we will have established that which the fathers never intended we should do. It may be thought justified in this case, but should it become an established practice it would be most unfortunate. I am firmly of the opinion that upon the President alone should rest the responsibility for retaining or dismissing an officer of this nature. It is in the interest of good and efficient government. . . .

MR. LAFOLLETTE. Mr. President, . . . I have listened patiently to the elaborate speeches on constitutional law which have been delivered here to show that the passage of this resolution on the part of the Senate would involve some violation of the Constitution, or some usurpation of power on the part of the Senate. And while I have admired the ingenuity with which those arguments have been presented, I have yet to hear a single reason advanced against the passage of this resolution which to my mind carries any weight whatsoever.

No Senator participating in this debate has contended that it is in the public interest to continue Mr. Denby as Secretary of the Navy. None, so far as I am advised, have denied that it would be vastly to the public interest to remove him from the position of great power and responsibility he now occupies. Indeed, the most elaborate speeches made in opposition to the pending resolution rest in the last analysis upon the contention that he should be impeached rather than removed by the President.

The farthest that any Senator has gone in defending Mr. Denby, so far as I have heard, is to contend that it is open to question whether he is or is not guilty of those "high crimes and

misdeameanors" which must be established under the Constitution before he can be impeached. Yet, sir, we are told that in this condition of our naval service—a service upon the intelligence and integrity of which the safety of the Nation is absolutely dependent—the Senate must remain silent and impotent no matter what the consequences of its inaction may be to the country.

Mr. President, I subscribe to no such doctrine, and I assert that such doctrine is without support in our Constitution, or in the laws of the land, or in any of the precedents of this body. On the contrary, it is the plain constitutional duty of the Senate, under the admitted facts, the undoubted facts, the undisputed facts, the statement of Secretary Denby himself, to adopt this resolution.

I shall take only a few minutes of the Senate's time to demonstrate this proposition, but I hope to demonstrate it so completely that it can never be fairly questioned again in the Senate or elsewhere.

What are the facts?

First, the President nominated and the Senate advised and consented to the appointment of Mr. Denby as Secretary of the Navy.

Second, the Senate must therefore share with the President the responsibility for Mr. Denby's official position and power and every act which he commits.

Third, by the joint action of the President and the Senate, Mr. Denby under the law, by virtue of his office, became trustee for the people of this country of great property interests, including (1) the entire Navy of the United States, its docks, navy yards, arsenals, etc.; and (2) three great naval oil reserves, Nos. 1 and 2 in California, and No. 3, known as Teapot Dome, in Wyoming. These naval oil reserves were created for, and were vital to, the operation of the Navy, which had been made as required by modern navy construction an oil-burning navy. It is common knowledge, and nowhere questioned, that oil is safest in the ground, where it can not be evaporated, or burned, or otherwise lost or destroyed.

The Navy rider amendment of June, 1920, gave to the Secretary of the Navy the power, and imposed upon him the duty, to preserve and protect the Government's oil supply contained in these great naval oil reserves. Mr. Denby could no more divest himself of his duties as the trustee of the naval oil reserves than he could divest himself of his duty to preserve and

protect the ships of the Navy, the docks, the navy yards, and the arsenals. The statute which imposed upon him the duty of preserving these naval oil reserves gave him power equally to protect and preserve all the classes of property for which he was a trustee. He could no more divest himself of responsibility for one than he could divest himself of responsibility for the other. No Executive order could override the statute, which in this matter was the supreme law of the land. Under the power conferred upon the Secretary of the Navy by the rider amendment to the naval appropriation bill, adopted on June 20, he was invested, as was Secretary Daniels, with all the power necessary to protect the oil in the ground.

Fourth, Denby, almost immediately following his appointment as Secretary of the Navy, entered into a scheme with Albert B. Fall, Secretary of the Interior, whereby he proposed to turn over to Fall all power and responsibility for the naval oil reserves. His testimony and public statements show that he claims to have taken the initiative in thus surrendering his exclusive custody and trusteeship of the naval oil reserves to Fall, and in attempting to transfer to the Secretary of the Interior the most important powers and duties of his office.

It is obvious that Edwin Denby, Secretary of the Navy, could not lawfully divest himself of the trust which his great office imposed exclusively upon him. If he could delegate to Fall the powers and obligations of his office in part—of those relating to the naval oil reserves—he could delegate to Fall all the duties and all the powers of his office, and the position of Secretary of the Navy would, in effect, have been abolished. That Denby knew his action in this respect was unlawful is shown by the fact that after the lease of Teapot Dome was made by Fall, many days after, he subsequently signed the leases in an attempt to make it lawful. But Denby testified before the Public Lands Committee of the Senate in effect that it was the mind of Fall and not the mind of Denby which made the leases. The negotiations were conducted by Fall, the ranch of Fall, not the home of Denby, was the place of rendezvous with Sinclair. The hundred thousand dollars in bills so far proven to have been loaned was turned over by Doheny to Fall and not to Denby. But this does not absolve Denby.

Let me put to you a very simple illustration of the situation. Suppose a private individual is a trustee and has the possession of a great fund, which as trustee he is bound in the most solemn manner to preserve and protect for the benefit of the cestui

que trust. And suppose, sir, under certain circumstances the trustee turns over to a third party the entire management and control and disposition of the trust fund, and merely signs without question and without investigation whatever documents are presented to him by the third person for the purpose of disposing of the trust fund. And suppose that this third person to whom the trustee has turned over the trust funds unlawfully dissipates and misapplies the funds for his own personal gain and profit. There may have been nothing criminal on the part of the trustee in thus turning over the trust funds to another, although his action was certainly unlawful, yet would any court absolve the trustee from responsibility for the misapplication and loss of the trust funds. Of course not. The question answers itself. But that is not all. Any court would immediately remove from office such unfaithful trustee just as quickly as it would remove him if he had profited personally by the misapplication of the trust funds.

Now, sir, no court can remove Denby from office except a court of impeachment, and then only upon proof of high crimes and misdemeanors—and upon proof so clear and explicit that it would compel a two-thirds vote of the Senate in favor of conviction.

As a practical matter, every Senator here knows that on the evidence as it now stands Denby can not be thus convicted, and an argument that the people of this country should be relegated to the slow and uncertain and probably unsuccessful procedure by impeachment, is merely an argument for the continuance of Denby in office.

The only other method by which he can be removed, and the only practicable method by which he can be ousted, is by action of the President. And just here, sir, is where the right and the duty of the Senate arises. The Senate, by its confirmation of Edwin Denby's appointment as Secretary of the Navy, advised the President in the most solemn manner, and by the deliberate and formal action of the Senate, that it approved Denby as a fit man for the office of the Secretary of the Navy. Since that time information has come to the Senate which shows Denby, even by his own admissions, not to be a fit and trustworthy man for the office, for, mind you, Mr. President, in the very face of the shocking testimony of the payment of money to Fall by Sinclair and Doheny, Denby—intellectually and morally abnormal, as it seems to me—publicly declared that if the opportunity were offered to repeat this monstrous proceeding, that he would do the

same thing again. That deliberate and shocking statement made by Edwin Denby is found in the *Congressional Record* of January 29, and also in a more elaborate statement given by him personally to the press a few days ago.

Now, of course, Senators who wish to do so may argue that in this situation they have no duty to perform relative to Secretary Denby's further continuance in this responsible office. They may argue, if they choose, that it is an invasion of the President's prerogatives for the Senate to advise the President that it no longer believes Denby to be a fit man for the office to which the Senate confirmed him, and therefore that it has become the sense of the Senate that the resignation of Secretary Denby should be requested.

But, sir, so far from being an invasion of the President's prerogatives, I submit that common honesty and the purpose of the Senate to keep its own hands clean requires that it should certify to the President its conviction that Edwin Denby is unfit to hold the office of Secretary of the Navy and to urge that his resignation be requested.

But why this sudden tenderness for the President's prerogatives? On the 29th day of last January this Senate passed a resolution, and every Senator opposing the pending resolution voted for it, which resolved "that the President of the United States be, and he hereby is, authorized and directed immediately to cause suit to be instituted and prosecuted for the annulment and cancellation of these leases," and "to enjoin the further extraction of oil from said reserves," and "to prosecute such other action or proceedings, civil and criminal, as may be warranted by the facts in relation to the making of said leases."

Under the Constitution of the United States, the duty of enforcing the laws of the United States rests with the President, and not with the Senate. It was the President's prerogative, if you please, to determine whether any action, civil or criminal, should be prosecuted. But that is not all. That same resolution had written into it a provision taking the prosecution out of the hands of Attorney General, and placing it in the hands of special counsel. That was a further interference with the prerogatives of the President.

In enforcing the laws, civil or criminal, the Senate does not under the Constitution divide the responsibility with the President, as it does in making appointments to Cabinet positions. The right of the Senate to petition the President to request Mr. Denby's resignation rests upon solid constitutional basis, since

for his appointment the Senate was responsible equally with the President. But for directing the President to enforce the law by civil and criminal prosecutions, and for directing him to appoint special prosecutors for that purpose, no such authority can be claimed. Yet, sir, every Senator present went on record in favor of the resolution of January 29. No Senator, therefore, who supported that resolution can, it seems to me, logically oppose the pending one on the ground that it infringes upon the President's prerogatives or assumes a power which the Senate does not possess.

Not once but many times has the Senate called upon the Executive to take action in matters wherein the final decision rests solely with the President. The Constitution of the United States provides:

The President shall be the Commander in Chief of the Army and Navy of the United States.

He alone is authorized to direct the naval and military forces of the land thus explicitly placed under his command by the Constitution.

Yet we all know that within a few months the Senate, by resolution, requested the President to withdraw our troops from Germany. Here was a matter placed under the exclusive control of the President by the express terms of the Constitution. Yet, sir, the Senators who are to-day foremost in opposing the pending resolution as an invasion of the President's prerogatives were the most insistent in demanding the passage of a resolution requesting the President, as Commander in Chief of the Army and the Navy, to remove our military forces from German territory.

In the face of these and many other precedents which have been cited it is simply idle to argue that there is any constitution or legal objection to the adoption of this resolution.

### c. Statement of President Coolidge, February 11, 1924

[*Congressional Record*, vol. 65, p. 2335.]

No official recognition can be given to the passage of the Senate resolution relative to their opinion concerning members of the Cabinet or other officers under Executive control.

As soon as special counsel can advise me as to the legality of these leases and assemble for me the pertinent facts in the various transactions, I shall take such action as seems essential for



the full protection of the public interest. I shall not hesitate to call for the resignation of any official whose conduct in this matter in any way warrants such action upon my part. The dismissal of an officer of the Government, such as is involved in this case, other than by impeachment, is exclusively an executive function. I regard this as a vital principle of our Government.

In discussing this principle, Mr. Madison has well said:

"It is laid down in most of the constitutions or bills of rights in the republics of America: It is to be found in the political writings of the most celebrated civilians, and is everywhere held as essential to the preservation of liberty, that the three great departments of government be kept separate and distinct."

President Cleveland likewise stated the correct principle in discussing requests and demands made by the Senate upon him and upon different departments of the Government in which he said:

"They assume the right of the Senate to sit in judgment upon the exercise of my exclusive discretion and an executive function, for which I am solely responsible to the people from whom I have so lately received the sacred trust of office.

"My oath to support and defend the Constitution, my duty to the people who have chosen me to execute the powers of their great office and not to relinquish them, and my duty to the Chief Magistracy, which I must preserve unimpaired in all its dignity and vigor, compel me to refuse compliance with these demands."

The President is responsible to the people for his conduct relative to the retention or dismissal of public officials. I assume that responsibility, and the people may be assured that as soon as I can be advised so that I may act with entire justice to all parties concerned and fully protect the public interests, I shall act.

I do not propose to sacrifice any innocent man for my own welfare, nor do I propose to retain in office any unfit man for my own welfare. I shall try to maintain the functions of the government unimpaired, to act upon the evidence and the law as I find it, and to deal thoroughly and summarily with every kind of wrong doing.

In the meantime, such steps have been taken and are being taken as fully to protect the public interests.

## d. Resignation of Secretary Denby

[*N. Y. Times*, Feb. 19, 1924.]

THE SECRETARY OF THE NAVY,  
WASHINGTON.

Feb. 17, 1924.

My dear Mr. President:

Heretofore I have verbally expressed to you my deep appreciation of your strong message in regard to the Robinson Resolution.

No one appreciates better than I how difficult your situation has become. I fear that my continuance in the Cabinet would increase your embarrassments. Therefore, I have the honor to tender my resignation as Secretary of the Navy.

As there are a few pending matters which should receive my personal attention, I suggest that my resignation be accepted as of the date of March 10, 1924.

It will always be a gratifying thought to me that neither you nor any one else has at any time advised me to resign.

I assure you again of my appreciation of the many courtesies you have shown me and of your last great act in refusing to accede to the demand of the Senate that you ask my resignation.

With cordial regards to you and Mrs. Coolidge, and best wishes, always, I am

Very sincerely yours,

EDWIN DENBY

THE WHITE HOUSE,  
WASHINGTON.

Feb. 18, 1924.

My dear Mr. Secretary:

Your resignation has been received. I am conscious that you have tendered it from a sense of public duty. It is with great regret that I am to part with you. You will go with the knowledge that your honesty and integrity have not been impugned. I treasure and reciprocate your expressions of friendship. I shall remember the fine sense of loyalty which you have always exhibited toward me with much satisfaction and always wish to you and yours contentment and success.

Very truly yours,

CALVIN COOLIDGE.

## 44. CABINET MEETINGS

Ordinarily the Cabinet meets regularly twice a week. Such meetings are always, however, subject to the call of the President, and on numerous occasions long periods have elapsed without any meeting at all. President Wilson having become so ill in September, 1919, as to be completely unable to attend to executive business, several members of his Cabinet felt it wise to meet on occasion to discuss together the problems of administration. These meetings were called by Secretary of State Lansing, as the ranking Cabinet officer, with the result indicated by the following documents.

## a. Wilson-Lansing Correspondence

[*Congressional Record*, vol. 59, pp. 2882-2883.]

The White House.

Washington, 7 Feb., 1920.

My Dear Mr. Secretary:

Is it true, as I have been told, that during my illness you have frequently called the heads of the executive departments of the Government into conference? If it is, I feel it my duty to call your attention to considerations which I do not care to dwell upon until I learn from you yourself that this is the fact. Under our constitutional law and practice, as developed hitherto, no one but the President has the right to summon the heads of the executive departments into conference, and no one but the President and the Congress has the right to ask their views or the views of any one of them on any public question.

I take this matter up with you because in the development of every constitutional system, custom and precedent are of the most serious consequence, and I think we will all agree in desiring not to lead in any wrong direction. I have therefore taken the liberty of writing you to ask you this question, and I am sure you will be glad to answer.

I am happy to learn from your recent note to Mrs. Wilson that your strength is returning. Cordially and sincerely, yours,

WOODROW WILSON.

Hon. Robert Lansing, Secretary of State.

The Secretary of State,

Washington, Feb. 9, 1920.

My Dear Mr. President:

It is true that frequently during your illness I requested the heads of the executive departments of the Government to meet for informal conference.

Shortly after you were taken ill in October certain members of the Cabinet, of which I was one, felt that in view of the fact that we were denied communication with you it was wise for us to confer informally together on interdepartmental matters and matters as to which action could not be postponed until your medical advisers permitted you to pass upon them.

Accordingly I, as the ranking member, requested the members of the Cabinet to assemble for such informal conference; and in view of the mutual benefit derived the practice was continued. I can assure you that it never for a moment entered my mind that I was acting unconstitutionally or contrary to your wishes, and there certainly was no intention on my part to assume powers and exercise functions which under the Constitution are exclusively confided to the President.

During these troublous times, when many difficult and vexatious questions have arisen and when in the circumstances I have been deprived of your guidance and direction, it has been my constant endeavor to carry out your policies as I understood them and to act in all matters as I believed you would wish me to act.

If, however, you think that I have failed in my loyalty to you and if you no longer have confidence in me and prefer to have another conduct our foreign affairs, I am, of course, ready, Mr. President, to relieve you any embarrassment by placing my resignation in your hands. I am, as always, faithfully, yours,

ROBERT LANSING.

The White House,

Washington, Feb. 11, 1920.

My Dear Mr. Secretary:

I am very much disappointed by your letter of February 9 in reply to mine asking about the so-called Cabinet meetings. You kindly explain the motives of these meetings, and I find nothing in your letter which justifies your assumption of presidential authority in such a matter. You say you "felt that, in view of the fact that you were denied communication with me, it was wise to confer informally together on interdepartmental matters and matters as to which action could not be postponed until my medical advisers permitted me" to be seen and consulted, but I have to remind you, Mr. Secretary, that no action could be taken without me by the Cabinet, and therefore there could have been no disadvantage in awaiting action with regard to matters concerning which action could not have been taken without me.

This affair, Mr. Secretary, only deepens a feeling that was growing upon me. While we were still in Paris I felt, and have felt increasingly ever since, that you accepted my guidance and direction on questions with regard to which I had to instruct you only with increasing reluctance, and since my return to Washington I have been struck by the number of matters in which you have apparently tried to forestall my judgment by formulating action and merely asking my approval when it was impossible for me to form an independent judgment, because I had not had an opportunity to examine the circumstances with any degree of independence.

I therefore feel that I must frankly take advantage of your kind suggestion that if I should prefer to have another to conduct our foreign affairs you are ready to relieve me of any embarrassment by placing your resignation in my hands, for I must say that it would relieve me of embarrassment, Mr. Secretary, the embarrassment of feeling your reluctance and divergence of judgment, if you would give your present office up and afford me an opportunity to select some one whose mind would more willingly go along with mine.

I need not tell you with what reluctance I take advantage of your suggestion, or that I do so with the kindest feeling. In matters of transcendent importance like this the only wise course is a course of perfect candor, where personal feeling is as much as possible left out of the reckoning. Very sincerely, yours,

WOODROW WILSON.

Hon. Robert Lansing, Secretary of State.

The Secretary of State,

Washington, Feb. 12, 1920.

My Dear Mr. President:

I wish to thank you sincerely for your candid letter of the 11th, in which you state that my resignation would be acceptable to you, since it relieves me of the responsibility for action which I have been contemplating and which I can now take without hesitation, as it meets your wishes.

I have the honor, therefore, to tender you my resignation as Secretary of State, the same to take effect at your convenience.

In thus severing our official association I feel Mr. President, that I should make the following statement, which I had prepared recently and which will show you that I have not been unmindful that the continuance of our present relations was impossible and that I realized that it was clearly my duty to bring

them to an end at the earliest moment compatible with the public interest.

Ever since January, 1919, I have been conscious of the fact that you no longer were disposed to welcome my advice in matters pertaining to the negotiations in Paris, to our foreign service, or to international affairs in general.

Holding these views, I would, if I had consulted my personal inclination alone have resigned as Secretary of State and as a commissioner to negotiate peace. I felt, however, that such a step might have been misinterpreted, both at home and abroad, and that it was my duty to cause you no embarrassment in carrying forward the great task in which you were then engaged.

Possibly I erred in this, but if I did it was with the best of motives.

When I returned to Washington in the latter part of July, 1919, my personal wish to resign had not changed, but again I felt that loyalty to you and my duty to the administration compelled me to defer action as my resignation might have been misconstrued into hostility to the ratification of the treaty of peace or at least, into disapproval of your views as to the form of ratification. I therefore remained silent, avoiding any comment on the frequent reports that we were not in full agreement. Subsequently, your serious illness, during which I have never seen you, imposed upon me the duty—at least, I construed it to be my duty—to remain in charge of the Department of State until your health permitted you to assume again full direction of foreign affairs.

Believing that that time had arrived, I had prepared my resignation when my only doubt as to the propriety of placing it in your hands was removed by your letter indicating that it would be entirely acceptable to you.

I think, Mr. President, in accordance with the frankness which has marked this correspondence and for which I am grateful to you, that I can not permit to pass unchallenged the imputation that in calling into informal conference the heads of the executive departments I sought to usurp your presidential authority. I had no such intention, no such thought.

I believed then and I believe now that the conferences which were held were for the best interests of your administration and of the Republic, and that belief was shared by others whom I consulted. I further believe that the conferences were proper and necessary in the circumstances, and that I would have been derelict in my duty if I had failed to act as I did.

I also feel, Mr. President, that candor compels me to say that I can not agree with your statement that I have tried to forestall your judgment in certain cases by formulating action and merely asking your approval when it was impossible for you to form an independent judgment because you had not had an opportunity to examine the circumstances with any degree of independence. I have, it is true, when I thought a case demanded immediate action, advised you what, in my opinion, that action should be, stating at the same time the reasons on which my opinion was based.

This I conceived to be a function of the Secretary of State, and I have followed the practice for the past four years and a half. I confess that I have been surprised and disappointed at the frequent disapproval of my suggestions, but have never failed to follow your decisions, however difficult it made the conduct of our foreign affairs.

I need hardly add that I leave the office of Secretary of State with only good will toward you, Mr. President, and with a sense of profound relief.

Forgetting our differences and remembering only your many kindnesses in the past, I have the honor to be, Mr. President, Sincerely, yours,

ROBERT LANSING.

The President, The White House.

The White House,  
Washington, Feb. 13, 1920.

My Dear Mr. Secretary:

Allow me to acknowledge with appreciation your letter of February 12. It now being evident, Mr. Secretary, that we have both of us felt the embarrassment of our recent relations with each other, I feel it my duty to accept your resignation, to take effect at once, at the same time adding that I hope that the future holds for you many successes of the most gratifying sort. My best wishes will always follow you, and it will be a matter of gratification to me always to remember our delightful personal relations. Sincerely, yours,

WOODROW WILSON.

Hon. Robert Lansing, Secretary of State.

## b. Statement of ex-Secretary Redfield

[*N. Y. Times*, Feb. 17, 1920.]

The question having been raised by the Chief Executive of the propriety of his Cabinet meeting during his absence because of sickness, the subject has become one of general public interest. A path must be outlined for future action. What is to be done in similar cases hereafter? Some light may be thrown upon the problem by considering the motives which were present in the minds of those who took part in the recent acts of usurpation, if they were such.

The Cabinet is not a body which is known to the Constitution. Its meetings are not held under provisions of law. It is not an executive body. The Cabinet as a unit does not do things. It has no rules of procedure. It keeps no minutes. It takes no votes. It has no secretary. It is, or it is supposed to be a body of counselors. It is assumed to be composed of the men who are in most intimate touch with the wishes of the Chief Executive, who understand his policies and his views, and who are trusted by him to carry them out, so far as they may relate to their several executive functions. For it should be remembered that while the Cabinet itself is informal, non-constitutional, and non-statutory, the men who compose it have, in addition to their advisory duties therein, certain obligations placed upon them by law as the heads of great executive departments. These duties do not originate with the President, and cannot be altered or removed by him. Under the organic law creating the Department of Commerce one would look in vain for any enactment of Cabinet duties, but would find clearly stated certain administrative duties.

These administrative duties interlock with those of other Cabinet officers. They touch constantly, daily, and in many places the work of the departments headed by other members of the Cabinet and of independent Government services. They are not and cannot be independent organisms functioning separately. Their chiefs are obliged at every turn to act in touch with one another, often to act jointly with one another. So it was my duty to serve on one board with the Secretaries of Agriculture and Labor, on another with these officers and with several more of our colleagues. There is thus an inter-relation between the members of the Cabinet not created by the President, which he did not make and which he cannot change. Examples are found



in the Federal Board for Vocational Education, the Council of National Defense, and there are others.

Consideration must also be given to the obligation, personal and public, which the members of the Cabinet owe to their chief. They are supposed to know his policies respecting the work of their own departments, and of the inter-related services mentioned above. Their duty of course is, so long as they remain members of the Cabinet, to hold up his hands, to carry out his policies, to act in accord with him in absence as well as in presence.

The writer is not a constitutional lawyer, but a plain business man. In dealing, therefore, with a matter of this kind, where no law exists, and where the Constitution itself is silent, he assumed, as a matter of course, that the rule of common sense would apply. This, as it seemed to him, called for consultation with his colleagues. He was indeed obligated by law to consult with them on many matters placed in their joint hands by statute. His work and theirs ran on parallel and even converging lines in many of their elements. Knowing the views of their chief on certain subjects, he assumed that his colleagues would be similarly informed on others. Furthermore, it seemed clear that team work was required and that the very shadow of doubt thrown upon executive affairs by the regrettable illness of the President would be accentuated if it were also known that each department was functioning independently, without knowledge either of the President's wishes or the views of his fellow executives. Loyalty to the President himself would seem to call for common counsel, in order that the fullest obtainable knowledge of his wishes might be had.

It is not clear to me how one can be a usurper when there is nothing to usurp, or how the conscientious meeting in conference in an effort to serve the country better and to aid one's chief can be considered other than a sympathetic and helpful act. There was no one man responsible for the meetings that took place unless, indeed, it should be assumed that the head of the oldest department in the Government should have taken the authority upon himself to forbid the meetings, for which authority I venture to think there is no shadow of law. Certainly, if usurpation took place it was done in a most singular way, for pains were taken at the first gathering to inform the President of the fact of the gathering, to send him an affectionate message, and his personal secretary was present a considerable part of the time, as well as on other occasions.

One can conceive that if the Secretary of State had assumed to call the Cabinet together for the purpose of advising him how to carry on the Government, usurpation might have been charged, but no such thing took place, no such assumption was made, no one thought of doing anything save serving the country and the President, under most distressing conditions for him and most perplexing ones for the country. Nor does it seem to the writer to matter seriously whether, in the times of disability of former Presidents, meetings had been held or not. The question to be decided was not what was the duty of the members of the Cabinet then, but what were the duties which weighed upon us. It was a time when there were matters of pressing public concern, in dealing with which the ablest man might well question the sufficiency of his own information and powers.

As I look back to that time, it seems to me essentially right that thoughtful men should desire the discussion with others on whose judgment and common interests they could depend, and that to avoid conferences would have been disloyal alike to the country and to the chief whom they were all striving to aid, and who had, in his sickness, their sincere sympathy. The serious events that took place need not here be rehearsed. The coal strike was one of them. They were pressing matters that would not wait, and something had to be done. Probably there would have been no objection had the Secretary of Labor or the Attorney General and others met at one or another of their offices to talk the matter over. If this is so, can it be possible that it was the place of meeting that made the matter unconstitutional and that gave it the character of usurpation? The meetings that actually took place did not differ in any essential particular from a meeting held in the office of any of the attendant Secretaries. Nothing was said or done that might not have taken place had the meeting been held in my office, or in any other. It is not correct to say that the Cabinet took decisions, and that in these decisions rested the act of usurpation. They did nothing of the kind. They discussed certain things which fell within the lawful scope of some of their number, as department heads. They expressed their views as to what should be done, on the action that was taken or was to be taken by the heads of departments functioning under the law.

Having given very careful thought to the whole matter, in view of the President's action, I confess to being increasingly astonished at it, for what was done was certainly done in his behalf, for his assistance, in his support, and it seems a pity that

one should have been singled out for special responsibility in a matter in which all were equally innocent or guilty. My relations with the President were, from beginning to end, cordial and delightful, but even with his judgment to the contrary before me, I must frankly say that under like conditions, in the absence of his express request to the contrary, or without law or constitutional enactment, I should feel it was my duty to do as was then done.

WILLIAM C. REDFIELD.

#### 45. THE VICE-PRESIDENT AND THE CABINET

The custom that the Cabinet should consist only of the heads of the executive departments has become so regular as to be considered almost a constitutional requirement. Nevertheless, it has often been suggested that the Vice-President, at least, be made an additional member of the Cabinet, as a "minister without portfolio," in order to put him more actively in touch with the administration which he might be called upon to conduct. President Washington frequently sought the written advice of Vice-President Adams, and on at least one occasion asked him to sit with the Cabinet. Adams himself, as President, was apparently favorable to the idea of inviting Vice-President Jefferson into the Cabinet, even though his political opponent. Other Presidents, notably Jackson, Taylor, and McKinley, relied frequently upon the advice of their Vice-Presidents—Van Buren, Fillmore, and Hobart, respectively. Vice-President Marshall presided over meetings of the Cabinet during President Wilson's absence in Europe, and Vice-President Coolidge sat regularly with the Cabinet during the administration of President Harding.

##### a. View of Jefferson

[Jefferson to Madison, Jan. 22, 1797. *Writings of Thomas Jefferson* (Ford ed., published by G. P. Putnam's Sons), vol. VII, pp. 107-108.]

My letters inform me that Mr. A. (Adams) speaks of me with great friendship, and with satisfaction in the prospect of administering the government in concurrence with me. I am glad of the first information, because though I saw that our ancient friendship was affected by a little leaven, produced partly by his constitution, partly by the contrivance of others, yet I never felt a diminution of confidence in his integrity, and retained a solid affection for him. His principles of government I knew to be changed, but conscientiously changed. As to my participating in the administration, if by that he meant the executive cabinet, both duty & inclination will shut that door to me. I cannot have a wish to see the scenes of '93. revived as to myself, and to de-

scend daily into the arena like a gladiator, to suffer martyrdom in every conflict. As to duty, the constitution will know me only as the member of a legislative body; and its principle is, that of a separation of legislative, executive and judiciary functions, except in cases specified. If this principle be not expressed in direct terms, yet it is clearly the spirit of the constitution, & it ought to be so commented and acted on by every friend of free government.

### b. View of Bryan

[*The Commoner*, Nov., 1920.]

In view of Senator Harding's announcement that Vice-President Coolidge will have a place at the President's council table, *The Commoner* reproduces from the first page of its first issue, January 23, 1901, the following:

"It has been intimated that Vice-President-Elect Roosevelt is desirous of receiving more consideration at the hands of the President than has, as a rule, been given to those occupying his position. Whether or not the report is true is not material, but the ambition, if he does entertain it, is an entirely worthy one.

"Why has the Vice-President been so generally ignored by the Chief Executive in the past? It is said that Mr. Breckenridge was only consulted once by President Buchanan, and then only in regard to the phraseology of a Thanksgiving Proclamation. This incident was related to a later Vice-President who was noted for his skill at repartee, and he replied, with a twinkle in his eye: 'Well, there is one more Thanksgiving Day before my term expires.'

"According to the constitution the Vice-President succeeds to the office in case the President dies, resigns, is removed, or becomes unable to discharge the duties of the office. The public good requires that he should be thoroughly informed as to the details of the administration and ready to take up the work of the Executive at a moment's notice. The Vice-President ought to be ex-officio a member of the President's cabinet; he ought to sit next to the President in the council chamber. Receiving his nomination from a national convention and his commission from the people, he is able to furnish the highest possible proof that he enjoys public respect and confidence, and the President should avail himself of the wisdom and discretion of such an advisor. While the responsibility for action rests upon the occupant of

the White House he is entitled to, and of course desires, all the light possible before deciding on any question.

"Congress can by law impose upon the Vice-President the duty of giving such assistance to his chief, or the President can of his own volition establish the precedent, and it would, in all probability, be observed by his successors.

"Many public men have avoided the second place on the ticket for fear it would relegate them to obscurity; some of Colonel Roosevelt's friends objected to his nomination on that ground. A cabinet position has generally been considered more desirable than the Vice-Presidency, but the latter in dignity and importance is, in fact, only second to the presidency, and the occupant deserves the prominence and prestige which would come from more intimate official association with the Executive."

### c. View of Vice President Marshall

[Interview in *N. Y. Times*, Dec. 5, 1920.]

The Constitution of the United States intended that the Vice President should be the presiding officer of the Senate and nothing else. To be a presiding officer it is necessary that the Vice President shall have the entire confidence of all the Senators. If a Vice President should attend meetings of the Cabinet practically as a member, it would tend to arouse suspicion, and Senators of the minority party might not trust him. This would make the path of the Vice President in the Senate a rough one.

If any representatives from the Capitol are to attend Cabinet meetings, the majority leader of the Senate and the majority leader of the House should be the men selected.

The idea that a Vice President should be completely informed as to the policies of the President so that he might carry them out in the event of the President's death, is to my mind fallacious. A Vice President might make a poor President, but he would make a much poorer one if he attempted to subordinate his own mind and views to carry out the ideas of a dead man.

### d. View of Vice President Dawes

[Arthur Sears Henning, in *Chicago Tribune*, Nov. 27, 1924.]

General Charles G. Dawes, Vice President Elect, has started speculation among politicians by the remark he made to President Coolidge that he does not care to sit with the cabinet while occupying the Vice Presidential office.

President Harding created the precedent by inviting Mr. Coolidge to sit with the cabinet regularly, thinking it would be valuable for the cabinet to have the advice of the Vice President and that the Vice President should be thoroughly informed on administrative matters against the time when he might be called upon to discharge the duties of President, as Mr. Coolidge was called upon to do two years later.

The general supposition here has been that the precedent would be observed in the future. Now, it appears that President Coolidge is disposed to acquiesce in the attitude of the Vice President-elect.

Some Republican politicians are of the idea that General Dawes is thinking he may be a candidate for President in 1928 and does not care to identify himself more than is necessary with the Coolidge administration and give approval, even by his mere presence in the cabinet meetings, to Coolidge administration policies which may be under fire within the party by the time the presidential primaries are held.

It might be that in 1928 Vice President Dawes would stand forth as the logical leader of the opposition to Coolidge policies and as the candidate of that opposition for the nomination for President. Under such circumstances it might prove embarrassing to his candidacy if the policies under fire were adopted at cabinet sessions which he attended and continued to attend.

It is known that many friends of General Dawes are hoping that he will be the nominee in 1928. Hence the politicians think they have some justification for their theory. The assumption is that President Coolidge will be a candidate for renomination, in which event General Dawes if he was determined also to be a candidate, would be pitted against the head of the administration with which he would be identified if he were to sit regularly in the cabinet.

There is also considerable speculation on the further disclosure that President Coolidge, when discussing the matter with Mr. Dawes at Plymouth, Vt., last summer, did not urge the general to reconsider his decision not to sit with the cabinet.

One suggestion heard is that the President would not feel comfortable with a personality of the Hell Maria type participating in the sessions and jazzing up the deliberations of the elder statesmen with pungently expressed opinions.

Then, too, General Dawes is the sort of man who would not acquiesce in policies of which he disapproved and he would not be unlikely to walk out on a cabinet session almost any time, an-

nouncing he was done with the whole business. That would create talk, if not scandal, and probably make Dawes a candidate for President on the spot.

Another theory is that President Coolidge was not favorably impressed by his own experience with the value of the participation of the Vice President in these sessions. He once told a friend that participation of the Vice President in the cabinet would work out satisfactorily all around provided the Vice President belonged to the same wing of the party as the President. Otherwise friction would be created.

If what General Dawes fears is becoming entangled in administration policies which he does not approve, he has good ground for that position. The single unfortunate experience of Mr. Coolidge as Vice President in participating in cabinet meetings arose from the charge, aired in the recent election, that he had given tacit approval to the handing over of the navy oil reserves to private exploitation. Mr. Coolidge always maintained that he never heard the oil matter discussed in the cabinet.

#### 46. THE CABINET AND CONGRESS

The chief distinguishing characteristic of European governments is the so-called "parliamentary" or "cabinet system," that is, the principle that the heads of the administrative departments who make up the cabinet, shall be selected from the members of parliament and continue to serve in both capacities so long as they are supported by a majority of parliament. There is thus a very close union between the legislative and executive departments of government, and the heads of the latter function actively as leaders of the former. In the United States both custom and constitutional provision have established instead the principle of separation of powers, in accordance with which the President and his Cabinet function independently of Congress. On occasion, members of either house are selected for Cabinet posts, but are then required to resign their seats in Congress, and more often Cabinet members have had no congressional experience at all. Since both Congress and the Executive are concerned with the work and problems of administration, many have felt that closer relations ought to be established by admitting members of the Cabinet to seats in either house, and thus approximating the European system to some extent. The character of these proposals, and the manner in which they might be accomplished is indicated by the following.

##### a. Message of President Taft, Dec. 12, 1912

[*Congressional Record*, vol. 49, pt. 1, pp. 895-896.]

*To the Senate and House of Representatives:*

This is the third of a series of messages in which I have brought to the attention of the Congress the important transactions of

the Government in each of its departments during the last year and have discussed needed reforms.

I recommend the adoption of legislation which shall make it the duty of heads of departments—the members of the President's Cabinet—at convenient times to attend the session of the House and the Senate, which shall provide seats for them in each House, and give them the opportunity to take part in all discussions and to answer questions of which they have had due notice. The rigid holding apart of the executive and the legislative branches of this Government has not worked for the great advantage of either. There has been much lost motion in the machinery, due to the lack of cooperation and interchange of views face to face between the representatives of the Executive and the Members of the two legislative branches of the Government. It was never intended that they should be separated in the sense of not being in constant effective touch and relationship to each other. The legislative and the executive each performs its own appropriate function, but these functions must be coordinated. Time and time again debates have arisen in each House upon issues which the information of a particular department head would have enabled him, if present, to end at once by a simple explanation or statement. Time and time again a forceful and earnest presentation of facts and arguments by the representative of the Executive whose duty it is to enforce the law would have brought about a useful reform by amendment, which in the absence of such a statement has failed of passage. I do not think I am mistaken in saying that the presence of the members of the Cabinet on the floor of each House would greatly contribute to the enactment of beneficial legislation. Nor would this in any degree deprive either the legislative or the executive of the independence which separation of the two branches has been intended to promote. It would only facilitate their cooperation in the public interest.

On the other hand, I am sure that the necessity and duty imposed upon department heads of appearing in each House and in answer to searching questions, of rendering upon their feet an account of what they have done, or what has been done by the administration, will spur each member of the Cabinet to closer attention to the details of his department, to greater familiarity with its needs, and to greater care to avoid the just criticism which the answers brought out in questions put and discussions arising between the Members of either House and the members of the Cabinet may properly evoke.



Objection is made that the members of the administration having no vote could exercise no power on the floor of the House, and could not assume that attitude of authority and control which the English parliamentary Government have and which enables them to meet the responsibilities the English system thrusts upon them. I agree that in certain respects it would be more satisfactory if members of the Cabinet could at the same time be Members of both Houses, with voting power, but this is impossible under our system; and while a lack of this feature may detract from the influence of the department chiefs, it will not prevent the good results which I have described above both in the matter of legislation and in the matter of administration. The enactment of such a law would be quite within the power of Congress without constitutional amendment, and it has such possibilities of usefulness that we might well make the experiment, and if we are disappointed the misstep can be easily retraced by a repeal of the enabling legislation.

This is not a new proposition. In the House of Representatives, in the Thirty-eighth Congress, the proposition was referred to a select committee of seven Members. The committee made an extensive report and urged the adoption of the reform. The report showed that our history had not been without illustration of the necessity and the examples of the practice by pointing out that in early days Secretaries were repeatedly called to the presence of either House for consultation, advice, and information. It also referred to remarks of Mr. Justice Story in his Commentaries on the Constitution, in which he urgently presented the wisdom of such a change. This report is to be found in Volume I of the Reports of Committees of the First Session of the Thirty-eighth Congress, April 6, 1864.

Again, on February 4, 1881, a select committee of the Senate recommended the passage of a similar bill, and made a report, in which, while approving the separation of the three branches, the executive, legislative, and judicial, they point out as a reason for the proposed change that, although having a separate existence, the branches are "to cooperate, each with the other, as the different members of the human body must cooperate with each other in order to form the figure and perform the duties of a perfect man." . . .

It would be difficult to mention the names of higher authority in the practical knowledge of our Government than those which are appended to this report. . .

WILLIAM H. TAFT.

The White House, December 19, 1912.

## b. Couzens Bill, 1926

[S. 3406, 69th Congress, 1st Session.]

IN THE SENATE OF THE UNITED STATES

March 3 (calendar day, March 4), 1926

MR. COUZENS introduced the following bill; which was read twice and referred to the Committee on Rules.

## A BILL

Granting privilege of the floor and right to participate in debate to heads of executive departments and other officers.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, the Secretary of Agriculture, the Secretary of the Interior, the Secretary of Commerce, the Secretary of Labor, the Attorney General, the Postmaster General, the governor of the Federal Reserve Board, the chairman of the United States Tariff Commission, the chairman of the Federal Trade Commission, the chairman of the Interstate Commerce Commission, the chairman of the Civil Service Commission, or the duly appointed representatives of such officials, shall be entitled to occupy seats on the floor of the Senate and the House of Representatives, with the right to participate in debate on matters relating to the business of their respective departments, under such rules as may be prescribed by the Senate and House, respectively.

SEC. 2. That the said secretaries and officers, the Attorney General, and the Postmaster General, or the duly appointed representatives of such officials, shall attend the sessions of the Senate on the opening of the sittings on Wednesday of each week, and the sessions of the House of Representatives on the opening of the sittings on Monday of each week, to give information asked by resolution or in reply to questions which may be propounded to them under the rules of the Senate and House; and the Senate and House may, by standing order, dispense with the attendance of one or more of said officers on either of said days.

## CHAPTER VIII

### THE ADMINISTRATION AND THE CIVIL SERVICE

#### 47. THE PRESIDENT AND THE ADMINISTRATION

The President is by the Constitution vested with the executive power and with the general enforcement of the laws. It is Congress, however, that creates and maintains the numerous administrative offices of whatever grade, and that prescribes the functions of these offices. The question has therefore arisen of the exact relationship between the President and the other officers in the national administrative system, and the extent to which he may control their conduct. This question became especially acute in connection with the relations of President Jackson to the Second United States Bank, which was established by Congress in 1816.

It was provided that government funds were to be deposited in that Bank or its branches, unless the Secretary of the Treasury should otherwise direct, in which case the reasons for removal were to be reported to Congress. A bill to recharter the Bank was passed in July, 1832, and promptly vetoed by President Jackson. Being re-elected in the campaign that followed, the President felt himself supported in his desire to crush the Bank, and in 1833, directed his Secretary of the Treasury to remove the government deposits and place them in selected state banks. Secretary McLane being opposed to the policy of removal and feeling himself, rather than the President, responsible under the act, refused to obey the President's order and was transferred to the State Department. The new Secretary of the Treasury, William J. Duane, likewise refused to remove the deposits and was summarily dismissed. Attorney General Roger B. Taney was thereupon appointed Secretary of the Treasury, and promptly carried out the President's directions, Jackson thus effectually destroying the Bank even before the expiration of its charter. The Senate refused to confirm Taney's appointment, and adopted a resolution censuring the President for what it considered his arbitrary and unlawful action; a resolution to which Jackson responded with a vigorous defense of his policy, and which was later (in 1837) expunged from the Senate journal.

[Protest of President Jackson against Senate Resolution of Censure, April 15, 1834. Richardson, *Messages and Papers of the Presidents*, vol. III, pp. 83-85.]

. . . . .

The Congress of the United States have never passed an act imperatively directing that the public moneys shall be kept in any particular place or places. From the origin of the Govern-

ment to the year 1816 the statute book was wholly silent on the subject. In 1789 a Treasurer was created, subordinate to the Secretary of the Treasury, and through him to the President. He was required to give bond safely to keep and faithfully to disburse the public moneys, without any direction as to the manner or places in which they should be kept. By reference to the practice of the Government it is found that from its first organization the Secretary of the Treasury, acting under the supervision of the President, designated the places in which the public moneys should be kept, and especially directed all transfers from place to place. This practice was continued, with the silent acquiescence of Congress, from 1789 down to 1816, and although many banks were selected and discharged, and although a portion of the moneys were first placed in the State banks, and then in the former Bank of the United States, and upon the dissolution of that were again transferred to the State banks, no legislation was thought necessary by Congress, and all the operations were originated and perfected by Executive authority. The Secretary of the Treasury, responsible to the President, and with his approbation, made contracts and arrangements in relation to the whole subject-matter, which was thus entirely committed to the direction of the President under his responsibilities to the American people and to those who were authorized to impeach and punish him for any breach of this important trust.

The act of 1816 establishing the Bank of the United States directed the deposits of public money to be made in that bank and its branches in places in which the said bank and branches thereof may be established, "unless the Secretary of the Treasury should otherwise order and direct," in which event he was required to give his reasons to Congress. This was but a continuation of his preexisting power as the head of an Executive Department to direct where the deposits should be made, with the superadded obligation of giving his reasons to Congress for making them elsewhere than in the Bank of the United States and its branches. It is not to be considered that this provision in any degree altered the relation between the Secretary of the Treasury and the President as the responsible head of the executive department, or released the latter from his constitutional obligation to "take care that the laws be faithfully executed." On the contrary, it increased his responsibilities by adding another to the long list of laws which it was his duty to carry into effect.

It would be an extraordinary result if because the person

charged by law with a public duty is one of his Secretaries it were less the duty of the President to see that law faithfully executed than other laws enjoining duties upon subordinate officers or private citizens. If there be any difference, it would seem that the obligation is the stronger in relation to the former, because the neglect is in his presence and the remedy at hand.

It can not be doubted that it was the legal duty of the Secretary of the Treasury to order and direct the deposits of the public money to be made elsewhere than in the Bank of the United States *whenever sufficient reasons existed for making the change*. If in such a case he neglected or refused to act, he would neglect or refuse to execute the law. What would be the sworn duty of the President? Could he say that the Constitution did not bind him to see the law faithfully executed because it was one of his Secretaries and not himself upon whom the service was specially imposed? Might he not be asked whether there was any such limitation to his obligations prescribed in the Constitution? Whether he is not equally bound to take care that the laws be faithfully executed, whether they impose duties on the highest officer of State or the lowest subordinate in any of the Departments? Might he not be told that it was for the sole purpose of causing all executive officers, from the highest to the lowest, faithfully to perform the services required of them by law that the people of the United States have made him their Chief Magistrate and the Constitution has clothed him with the entire executive power of this Government? The principles implied in these questions appear too plain to need elucidation.

But here also we have a contemporaneous construction of the act which shows that it was not understood as in any way changing the relations between the President and Secretary of the Treasury, or as placing the latter out of Executive control even in relation to the deposits of the public money. Nor on that point are we left to any equivocal testimony. The documents of the Treasury Department show that the Secretary of the Treasury did apply to the President and obtained his approbation and sanction to the original transfer of the public deposits to the present Bank of the United States, and did carry the measure into effect in obedience to his decision. They also show that transfers of the public deposits from the branches of the Bank of the United States to State banks at Chillicothe, Cincinnati, and Louisville, in 1819, were made with the approbation of the President and by his authority. They show that upon all important questions appertaining to his Department, whether

they related to the public deposits or other matters, it was the constant practice of the Secretary of the Treasury to obtain for his acts the approval and sanction of the President. These acts and the principles on which they were founded were known to all the departments of the Government, to Congress and the country, and until very recently appear never to have been called in question.

Thus was it settled by the Constitution, the laws, and the whole practice of the Government that the entire executive power is vested in the President of the United States; that as incident to that power the right of appointing and removing those officers who are to aid him in the execution of the laws, with such restrictions only as the Constitution prescribes, is vested in the President; that the Secretary of the Treasury is one of those officers; that the custody of the public property and money is an Executive function which, in relation to the money, has always been exercised through the Secretary of the Treasury and his subordinates; that in the performance of these duties he is subject to the supervision and control of the President, and in all important measures having relation to them consults the Chief Magistrate and obtains his approval and sanction; that the law establishing the bank did not, as it could not, change the relation between the President and the Secretary—did not release the former from his obligation to see the law faithfully executed nor the latter from the President's supervision and control; that afterwards and before the Secretary did in fact consult and obtain the sanction of the President to transfers and removals of the public deposits, and that all departments of the Government, and the nation itself, approved or acquiesced in these acts and principles as in strict conformity with our Constitution and laws. . . .

ANDREW JACKSON.

#### 48. CONGRESSIONAL INVESTIGATIONS

Just as the President may use his power of removal to ensure the carrying out of his policies, so Congress, through its power of impeachment, may exercise a measure of control over the executive and administrative officers. Impeachment is, however, a clumsy device, ineffective except for the most flagrant derelictions from duty or abuses of power, and does not serve as a continuing check on the administration. Hence committees of either house have from time to time been authorized to conduct investigations into the conduct of the various administrative agencies, and by the questioning of officials concerned, by the revelation of laxity or misconduct, by the mere application of publicity and criticism, have exercised a very

considerable influence over administrative policy and methods. These investigations have been especially numerous of recent years, the most notable being that by a Senate committee into the oil land leases of the Harding administration, which served to reveal the frauds in connection with such leases and ultimately to restore the congressional policy of oil conservation. It is charged by some, however, that such investigations are often of a partisan character, designed merely to annoy and hamper the executive branch, and that they are quite outside the proper jurisdiction of Congress. The discussions of the purpose and value of this practice deserve the most careful attention.

#### a. Letter of Secretary Mellon to President Coolidge

[*Congressional Record*, vol. 65, pp. 6087-6088.]

The Secretary of the Treasury,  
Washington, April 10, 1924.

Dear Mr. President:

On March 12, 1924, by Senate resolution 168, the Senate appointed a special committee to investigate the Bureau of Internal Revenue and suggest corrective legislation. Senator Couzens was the moving spirit of the resolution. In urging the appointment of the committee, his purpose was ostensibly to obtain information upon which to recommend to the Senate constructive reforms in law and in administration. With such a purpose I am entirely in accord.

From the line of investigation selected by Senator Couzens and by the atmosphere which he has seen fit to inject into the inquiry, it is now obvious that his sole purpose is to vent some personal grievance against me. All companies in which I have been interested have been sought out. I have aided in obtaining from them the waiver of their right to privacy, and in the delivery of their income tax returns in complete detail to the committee.

This investigation has disclosed that no company in which I have been interested has received any different or better treatment than any other taxpayer. The inquiry, so far as showing that I favored my own interests, has failed completely. Any constructive purpose of the committee has now been abandoned.

At a meeting of the committee yesterday Senator Couzens carried a resolution, against the objection of the two Republican members, empowering Francis J. Heney to assume charge of the investigation and to conduct the examination of witnesses, with the understanding, expressly stated in the resolution, that neither the committee nor the Government pay Heney's com-

pensation. In effect, a private individual is authorized to investigate the Government. This individual is paid by, not the Senate or its committee, but by Senator Couzens alone.

As Secretary of the Treasury I have charge of the finances of the nation. The Treasury touches directly or indirectly every person, and in the sound conduct of its business affects the industrial life of the United States. Already the present investigation has greatly injured the efficiency of the income tax organization, and the sufferer is not the Government, but every taxpayer. Attacks such as these seriously impair the morale of the 60,000 employes of the department throughout the country.

Government business cannot continue to be conducted under frequent interference by investigations of the Congress, entirely destructive in their character. If the interposition of private resources be permitted to interfere with the executive administration of Government, the machinery of Government will cease to function.

I owe to you and to the people of the United States the duty to see that the Treasury conducts efficiently and faithfully the great tasks continuously presented to it, that its integrity be preserved, and that its future be insured.\* When through unnecessary interference the proper exercise of this duty is rendered impossible, I must advise you that neither I nor any other man of character can longer take responsibility for the Treasury. Government by investigation is not government.

Faithfully yours,

A. W. MELLON.

Secretary of the Treasury.

The President,  
The White House.

\* This has been my sole thought as head of this department.

## **b. Message of President Coolidge to the Senate**

[*Congressional Record*, vol. 65, p. 6087.]

To the Senate:

Herewith is a copy of a letter from the Secretary of the Treasury, the Hon. Andrew W. Mellon, to me, which I feel constrained to transmit to the Senate for its information. Also a copy of the resolution adopted by the committee investigating the Bureau of Internal Revenue. This is done because it seems incred-



ible that the Senate of the United States would knowingly approve the past and proposed conduct of one of its committees, which this letter reveals.

There exists, and always should exist, every possible comity between the executive departments and the Senate. Whatever may be necessary for the information of the Senate or any of its committees, in order to enable them to perform their legislative or other constitutional functions, ought always to be furnished willingly and expeditiously by any department.

The executive branch has nothing that it would wish to conceal from any legitimate inquiry on the part of the Senate. But it is recognized both by law and by custom that there is certain confidential information which it would be detrimental to the public service to reveal. Such information as can be disclosed, I shall always unhesitatingly direct to be laid before the Senate. I recognize also that it is perfectly legitimate for the Senate to indulge in political discussions and partisan criticism.

The Senate resolution appointing this committee is not drawn in terms which purport to give any authority to the committee to delegate their authority, or to employ agents and attorneys. The appointment of an agent and attorney to act in behalf of the United States, but to be paid by some other source than the public Treasury, is in conflict with the spirit of Section 1764 of the Revised Statutes, the Act of March 3, 1917.

The constitutional and legal rights of the Senate ought to be maintained at all times. Also the same must be said of the executive departments. But these rights ought not to be used as a subterfuge to cover unwarranted intrusion. It is the duty of the Executive to resist such intrusion and to bring to the attention of the Senate its serious consequences. That I shall do in this instance.

Under a procedure of this kind, the constitutional guarantees against unwarranted search and seizure break down, the prohibition against what amounts to a Government charge of criminal action without the formal presentment of a Grand Jury is evaded, the rules of evidence which have been adopted for the protection of the innocent, are ignored, the department becomes the victim of vague, unformulated and indefinite charges, and instead of a Government of law we have a Government of lawlessness.

Against the continuance of such a condition, I enter my solemn protest, and give notice that in my opinion the department ought not to be required to participate in it. If it is to be continued, if the Government is to be thrown into disorder by it, the re-

sponsibility for it must rest on those who are undertaking it. It is time that we return to a Government under and in accordance with the usual forms of the law of the land. The state of the Union requires the immediate adoption of such a course.

CALVIN COOLIDGE.

The White House, April 11, 1924.

### c. Power of Investigation

[*McGrain v. Daugherty* (1927), U. S. Supreme Court Advance Opinions. Feb. 1, 1927, pp. 370-385.]

Mr. Justice Van Devanter delivered the opinion of the court.

...

[Having just made an exhaustive review of the previous practices and decisions, Justice Van Devanter continued:]

We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both Houses of Congress took this view of it early in their history—the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action—and both houses have employed the power accordingly up to the present time. The Acts of 1798 and 1857, judged by their comprehensive terms, were intended to recognize the existence of this power in both houses and to enable them to employ it “more effectually” than before. So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.

We are further of opinion that the provisions are not of doubtful meaning, but, as was held by this court in the cases we have reviewed, are intended to be effectively exercised, and therefore to carry with them such auxiliary powers as are necessary and appropriate to that end. While the power to exact information in aid of the legislative function was not involved in those cases, the rule of interpretation applied there is applicable here. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legis-

lation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may effectively be exercised.

The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn v. Thompson* and *Marshall v. Gordon* point to admissible measures of relief. And it is a necessary deduction from the decision in *Kilbourn v. Thompson* and *Re Chapman* that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry. . . .

It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is re-

flected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year. . . .

#### 49. CHARACTER OF ADMINISTRATIVE COMMISSIONS

A notable tendency in national administration has been the creation by Congress of important agencies independent of the Executive Departments, multiple instead of single-headed in form, and vested with quasi-legislative and quasi-judicial as well as with strictly administrative functions. Of such a character are the Interstate Commerce Commission, Federal Trade Commission, Federal Reserve Board, Tariff Commission, Shipping Board, and others. Congress has usually also provided with respect to these commissions, that the members shall have a fairly long tenure, with overlapping terms, and that they shall be representative of various interests, whether political parties, geographical sections, classes of population, or other group interests. All this is clearly for the purpose of securing a fair hearing for all interests concerned and impartial action on matters that arise. On the other hand, this serves to limit the President in his control of these commissions and in his direction of administrative policy, and many have therefore felt that efficiency and responsibility in administration are lacking. The value of such group or regional representation, and the manner in which these boards and commissions function is to some extent indicated by the following.

##### a. Resignation of Commissioner Thompson from Shipping Board

[*N. Y. Times*, Oct. 4, 1925.]

Oct. 3, 1925.

My Dear President:

In November I shall have served five years as the Commissioner of the United States Shipping Board from the Gulf States, under the appointments of President Wilson, President Harding and yourself.

It now appears certain that effort will be made to change the present Shipping law, abolish the regional representation provided therein and make it an Executive branch instead of, as now, an independent administrative office of Government, similar to the Interstate Commerce Commission. I wish to retire to be free to join with others in opposing such change without having it construed that such opposition was prompted by self-interest in wishing to retain the office. This would neutralize whatever

influence may be possessed by myself or the newspapers published by me.

The experience gained by my five years of service has convinced me that those who are to administer the Government's agency of shipping should be appointed from the Atlantic, Pacific, and Gulf seaboard, the Great Lakes and the interior, and that this is a wise and necessary provision of the present law. General administration of the duties imposed on the board by Congress is strengthened by administration by members possessing intimate knowledge of the needs and interests of their sections. Specific cases clearly evidence that control of ship operation by one man from one section, however appealing in principle, does not preserve equitable ocean transportation benefits or protection of the products of manufacturing or agricultural interests of all sections. The Merchant Marine Act of 1920 was conceived and enacted to serve such interests.

The previous delegation of wide powers to the Fleet Corporation, a policy of administration recently revoked by the board under its responsibility to the Congress, destroyed regional voice and authority. It neutralized the intent of the Congress, as defined in the law, and adversely affected American flagship operation. It caused withdrawal of ships from essential trade routes, resulted in a reduced volume of commerce in American flagships, a gain to our ocean competitors, and weakened the country's influence in world trade.

So able and poised a man as Senator Underwood envisioned the principle of territorial equality before the American Bankers' Association last Thursday. Referring to the Interstate Commerce Commission, an independent office establishment of government similarly created by the Congress, Senator Underwood said:

"Fair and just representation must be given on the Interstate Commerce Commission to that territory that stands unrepresented today," pointing out that "the South and the West, from the standpoint of territory, population and production, have been deprived of equal and just representation."

A member of the board from the Gulf States, as well as the other sections of the country, is necessary unless the ports of the Gulf and the vast interior section of the United States using these ports as their nearest ocean outlet for their export and surplus products are to be denied voice in ship operation. I beg you to believe, Mr. President, that such voice is very vital to my section and our people, for figures prepared by the Depart-

ment of Commerce show that 78 per cent. of the exports of the United States last year originated in Southern and Southwestern States naturally tributary to Southern ports.

For the reasons outlined, I respectfully ask that you accept this as my resignation as of November 1 for the term expiring June, 1929.

With great respect, Mr. President,

I am very sincerely yours,

FREDERICK I. THOMPSON.

#### b. Statement of Commissioner Thompson, Oct. 5, 1925

[*Congressional Record*, vol. 67, p. 1948.]

The statement of certain facts with respect to the Shipping Board situation can do no harm, would be in justice to members of the Shipping Board, and will show a present-day tendency to transfer authority to the executive department of the Government clearly intended by the Congress in the merchant marine act, 1920, to be lodged independently of the executive branch.

The Shipping Board was created by Congress as an independent branch of the Government, not an executive branch. Its members are required by law to be appointed from both political parties, from all geographical areas of the United States, and for a term of years overlapping changes in national administration.

The stock of the Fleet Corporation is vested by law in the members of the Shipping Board. The officials of the Fleet Corporation are elected by and responsible to the Shipping Board. In any neglect of duty or malfeasance of any official of the Fleet Corporation it is chargeable to the board, not the Fleet Corporation officials. The responsibility for the custody of a vast Government property and money is that of the Shipping Board.

When Fleet Corporation officials recommend to the Shipping Board, for instance, the sale of Government property in the custody of the board under the law, they do so as agents or employees without legal responsibility. The members of the Shipping Board may delegate preliminary administration detail as a first step to a formal action, but can not escape responsibility for final action.

Confusion and discord inevitably result when an employee feels the source of his authority to be greater than those actually responsible for the conduct of the business. The President picked Admiral Palmer. He insisted Admiral Palmer be given powers

the Congress exclusively lodged in the Shipping Board, the exact language of the merchant marine act being that power lodged in the Shipping Board "may be exercised directly by the board or by it through the Emergency Fleet Corporation."

To correct the chaos and maladministration resulting from such action members of the board either had to take sharp issue with the President or ignore their obligations under their oath of office. The Constitution of the United States specifically provides that the Congress shall have power to dispose of Government property. Yet the President insisted in a communication to the board that members of the board should not even discuss the sales of ships with prospective purchasers, but that this function should remain exclusively with Admiral Palmer. Thus denied, except in open conflict with the President, opportunity to learn all the facts in connection with negotiation for the sale of public property, the board constituted by law as the only authority capable of giving a bill of sale to such property was criticized because it would not agree to sell established ship routes at figures determined by Admiral Palmer.

For this the board was criticized as "interfering" with the Fleet Corporation. Those who charge such action as "interference" sponsor the proposition that those responsible under their oath for the proper discharge of their public duties should delegate such power to some one else and excuse themselves from their solemn responsibility. Obviously, such a policy would break down all proper administration of laws.

I neither wish to wrangle with the Chief Executive nor violate my oath of office. I voted against the sacrifice of public property. I refused to vote for the sale of ship routes at one-fifth of the world market price for such property. The law specifically directs members of the board in selling ships, among other things, to be governed by such "facts or conditions as would influence a prudent, solvent business man in the sale of similar vessels or property which he is not forced to sell." The prices recommended by Admiral Palmer at which ships would be sold was a sacrifice. It constituted a property or money subsidy not authorized in the law, the policy of subsidy having been considered by the Congress and rejected.

## 50. CONTROL OF ADMINISTRATIVE COMMISSIONS

The President is considered to be the head of the national administrative system, and has the power to appoint and remove all important administrative officers, including the members of the administrative boards or

commissions. The character of these commissions and the conditions imposed by Congress with respect to their composition, have, however, led to the general assumption that these were intended to be largely independent of the Executive, to be representative rather of a diversity of interests, and to be guided in their policies perhaps more by Congress than by the President. Such strong Presidents as Roosevelt and Wilson apparently made little effort to bring these commissions under their control, leaving the members free, following their appointment, to determine policies for themselves. Of recent years, however, and notably during the administration of President Coolidge, the view that the President had the right to guide the policies and conduct even of these commissions began to be asserted, and attempts made to bring about such control.

#### a. Appointment of David J. Lewis to Tariff Commission

[Letter of Commissioner Culbertson to Commissioner Costigan, in *Congressional Record*, vol. 67, pp. 2187-2189.]

United States Tariff Commission  
William F. Culbertson, Vice Chairman

Washington, September 9, 1924.

MY DEAR COSTIGAN: You will perhaps have seen to-day in the press that Mr. Lewis was reappointed yesterday. I reached Washington Sunday evening and had not been in my office very long Monday morning before I was sent for by the President. The result of my interview is covered by a memorandum, a copy of which I inclose.

When I returned to the office I took the President's suggestions up with Lewis, and later he reached the decision that he would not write the letter of resignation requested by the President. He, however, went to see the President during the afternoon, and I presume he will write you the details of what took place. In general this is what happened—

He went into the President's office, and the President had before him the commission. He took up his pen and signed it in Lewis's presence. He then turned to Lewis and asked him whether he had "that letter." Lewis then explained that he did not feel free to furnish the President with the letter which he requested. Lewis said that the President was visibly disturbed and said with a little heat that it did not make any difference anyway; that the position would be held only at the pleasure of the President. Lewis then said to the President that only the two of them knew that the commission was signed, and he suggested that the President was at liberty to destroy the commission. The President, however, did not respond to this suggestion, and Lewis



left the President's office with his commission. A little later he was sworn in.

Thus ends another curious chapter in the Tariff Commission's history. It indicates clearly, I think, that there is a line beyond which the President will not go in opposing the principles for which the three of us have stood in the development of the Tariff Commission.

We miss your counsels very much, but I suggest that you stay in the Colorado climate until you are certain that your return here will not bring with [*sic*] a return of your hay fever.

Very cordially yours,

CULBERTSON.

Hon. EDWARD P. COSTIGAN,  
*Palmer Lake, Colo.*

[Enclosure]

Contemporary memorandum of the interview with the President, September 8, 1924:

Shortly after I reached my office this morning—about 9:30—I received a request over the telephone to come to the White House to see the President. I went over immediately. The President was reasonably cordial. He began by saying that the subject of the interview was Mr. Lewis's reappointment. Mr. Lewis's term as a member of the Tariff Commission expired yesterday. The President stated that he intended to reappoint Mr. Lewis but that he desired that Mr. Lewis prepare and give to him a letter of resignation as a member of the Tariff Commission. At first I did not fully comprehend the nature of this request.

I spoke of Mr. Lewis's term having already expired. Then the President explained that he wanted Mr. Lewis to submit his resignation under the new commission to be effective in case he (the President) desired at any time in the future to accept it.

The President at this point called in Mr. Forster, one of his secretaries, and instructed him to make out Mr. Lewis's commission of reappointment as a member of the Tariff Commission, effective to-day.

The President then handed me a sheet of White House paper, so that I could take down the tenor of the letter which he wished Mr. Lewis to write. I wrote down the following words: "I hereby resign as a member of the Tariff Commission, to take effect upon your acceptance."

I raised the objection at this point that an unqualified resignation of this kind would imply on the record that Mr. Lewis did not desire to continue as a member of the Tariff Commission.

The President replied that this was a matter for Mr. Lewis to decide. In explanation of his request the President said that he desired to be free after the election concerning the position filled by Mr. Lewis. He said that if he were not elected the Democrats might undertake to hold up other appointments which he made during the next session of the Senate and he implied that he desired to use the reappointment of Mr. Lewis for trading purposes in case of necessity.

I thereupon asked the President whether I could have his assurance that if he were reelected Mr. Lewis would be continued as a member of the Tariff Commission. He said that he could not at this time make any commitments.

We then talked of other matters, and at the end the President asked me to have Mr. Lewis see him during the afternoon, when he said he would give him his commission.

**b. Correspondence of President Coolidge and Commissioner  
Haney of the Shipping Board**

[*Congressional Record*, vol. 67, pp. 1944-1945.]

EXECUTIVE OFFICE,  
*Lynn, Mass., August 27, 1925.*

Hon. B. E. HANEY,  
*United States Shipping Board:*

It having come to my attention that you are proposing to remove Admiral Palmer contrary to the understanding I had with you when I reappointed you, your resignation from the United States Shipping Board is requested.

CALVIN COOLIDGE.

AUGUST 28, 1925.

The PRESIDENT,  
*Executive Office, Lynn, Mass.*

MY DEAR MR. PRESIDENT: I am in receipt of your telegram of the 27th instant, reading as follows:

"It having come to my attention that you are proposing to remove Admiral Palmer, contrary to the understanding I had with you when I reappointed you, your resignation from the United States Shipping Board is requested."

When you honored me last June by tendering a reappointment, I stated that I was reluctant to accept, not only for personal business reasons, but because I was not in sympathy with retaining President Palmer at the head of the Fleet Corporation.

At your request, the reasons for my opposition to President Palmer were fully and frankly stated, and were, in substance, as follows: First, without questioning his ability as a naval officer, I considered him incompetent from temperament and lack of experience to discharge the duties imposed by the merchant marine act of 1920 upon the Shipping Board, whose agent he was; second, because he seemed determined not to confer with the board upon any of the questions which came within its peculiar province under the statute, which involved the board's discretion, and could not be delegated to the president of the Fleet Corporation; and, third, because he seemed disposed to proceed along lines independent of board action, although he was by his appointment created the board's agent. This course, in my view, was in some instances a violation of the statute, or not in accordance with the legislative intent as expressed in the statute.

Upon your invitation, I stated at length my views on these subjects without equivocation or evasion. There certainly was no express understanding concerning the continuance in office or removal of President Palmer. I regret exceedingly that you could have any misunderstanding as to my purpose and intent in the event of my reappointment, for I knew that you had been informed by Senator McNary that I would not, and in addition to that, I myself had definitely advised you that I could not accept a reappointment if any conditions whatsoever were attached to that reappointment.

I did not intend by word or act to lead you, directly or indirectly, Mr. President, to understand that if reappointed I would be a party to continuing Mr. Palmer as president of the Emergency Fleet Corporation. You knew that I had voted against his reelection within two weeks before the time we had our conference on the subject of reappointment. You also know that I vigorously opposed the adoption of a resolution granting any powers to the president of the Fleet Corporation which the statute expressly imposed upon the board itself.

I did not intend by word or act to lead you to think my view of President Palmer and his activities, which I expressed to you, would change unless there was a change in his administrative policy. Under these circumstances, in justice to myself, I am compelled to say to you that I am not conscious of having in any way caused you to have reached the understanding referred to in your telegram.

Obviously, Mr. President, to have given you any such promise as that implied by your telegram would have amounted to a total

disregard of my oath of office and my obligation to Congress, whose sole agent I am. Such a promise and disregard of my official oath and the consummation of such an understanding would have obligated me to support the administration of the merchant marine act by the president of the Fleet Corporation, however inefficient, notwithstanding the fact that the law imposed upon me, as a commissioner of the Shipping Board, the duty to support and maintain an efficient administration.

I think that I understand the purposes which Congress had in mind when the merchant marine law was enacted, and when it by law, in express terms, required the President to recognize bipartisan appointments and geographical sections in the appointment of the members of the board. The act specifically declares its purpose to be to create a merchant marine (1) for the national defense, (2) for proper growth of our foreign and domestic commerce, and (3) to serve as a naval or military auxiliary in time of war or national emergency. I respectfully direct your attention to the fact that while the merchant marine act of 1920 provides for the operation and disposition of vessels and shipping property, it also directs the board to keep clearly in mind at all times the declared purposes of the act which I have mentioned.

The board, when once appointed by the President in conformity with the statute, is an independent agency of the United States Government and is vested by the statute with large and important discretionary powers, which the members thereof are compelled to exercise independently of any other governmental agency so long as the law is in force, and, with the exception of the power of removal for causes specified in the act, the members of the board are responsible only to the legislative body.

The powers conferred upon the board are largely judicial in their nature, involving the exercise of discretion, and these powers can not be delegated by the board to Mr. Palmer or any other agent. It may be answered that if any of these powers have been delegated to the president of the Emergency Fleet Corporation it was done by act of the board itself. But even if that be conceded, the attempted delegation of power does not deprive any individual member of the board of the right to express his opinion as to these powers and to vote, under the sanction of his oath of office, as his judgment may direct.

If, therefore, I am to be asked to resign because I have seen fit to exercise the power expressly conferred upon me by Congress in urging the removal of an inefficient agent of the board, then I submit that the control of the operation and disposition of the

merchant fleet is taken from this bipartisan and sectionally constituted body and placed in the hands of one man, for whose actions the board is responsible but whose actions it can not direct or control.

My opposition to President Palmer's administration, in addition to the reasons above stated, is based upon the following :

His policy, of necessity, fails to carry out the purposes of the merchant marine act, because such policy not only is failing to establish a merchant marine sufficient to carry a major portion of our commerce, but, on the contrary, our merchant marine is carrying less and less each year.

Again, the purpose of the act to establish a military and naval auxiliary is being disregarded in that the number of vessels in use and available for such purpose is being steadily reduced ; and last, but not least, under his administration we are losing American commerce to foreign shipowners, one of the very things the act in question intended should not occur.

Under these circumstances, Mr. President, for me to comply with your request that I resign would carry an implication which I can not permit.

Very respectfully,

BERT E. HANEY.

## 51. ADMINISTRATIVE REORGANIZATION

The national administrative system has developed in a haphazard manner, Congress having from time to time provided new services and new agencies to meet specific needs, without seriously attempting to fit these new agencies into a harmonious whole. Consequently, many departments are now entrusted with services that do not properly belong there, some useless services are maintained, others are duplicated, and still others have a very doubtful relationship to the whole. Serious efforts to study the problem of the national administration, with a view to reorganization on a more logical and efficient basis, were first made in 1910, when Congress authorized the appointment of a Commission on Economy and Efficiency. President Taft, in 1912, submitted the report of this body to Congress but nothing came of its proposals. By joint resolution in 1920 and 1921, Congress created the Joint Committee on Reorganization, composed of three members of each house together with an outsider as representative of the President, which committee reported to Congress in 1924. At the same time President Harding and his Cabinet had been studying the matter, and presented their recommendations to Congress. None of these plans have yet (in 1928) been put into effect, but are significant as indicating the need for reorganization of some sort.

## a. Reorganization Plan of the President and Cabinet

[*House Document No. 356*, 68 Cong., 1 Sess., pp. 35-39.]

### OUTLINE OF THE REORGANIZATION PLAN RECOMMENDED BY THE PRESIDENT AND THE CABINET.

#### SUMMARY OF RECOMMENDATIONS.

The outstanding recommendations are as follows:

- I. The coordination of the Military and Naval Establishments under a single Cabinet officer, as the Department of National Defense.
- II. The transfer of all nonmilitary functions from the War and Navy Departments to civilian departments—chiefly Interior and Commerce.
- III. The elimination of all nonfiscal functions from the Treasury Department.
- IV. The establishment of one new department—the Department of Education and Welfare.
- V. The change of the name of the Post Office Department to Department of Communications.
- VI. The attachment to the several departments of all independent establishments except those which perform quasi-judicial functions or act as service agencies for all departments.

#### THE MORE IMPORTANT CHANGES, BY DEPARTMENTS.

##### STATE DEPARTMENT.

- (a) The Bureau of Insular Affairs is transferred from the War Department to the Department of State.

##### TREASURY DEPARTMENT.

- (a) The General Accounting Office, now an independent establishment, is transferred to the Treasury Department.
- (b) The following bureaus, now in the Treasury Department, are transferred to other departments, as noted:

<i>Bureau or office.</i>	<i>Transferred to—</i>
Bureau of the Budget.....	Independent establishment.
General Supply Committee.....	Independent establishment. <sup>1</sup>
Public Health Service.....	Education and Welfare.
Coast Guard.....	Commerce, Defense. <sup>2</sup>
Supervising Architect's Office.....	Interior.

## WAR AND NAVY DEPARTMENTS.

(a) These departments are placed under a single Cabinet officer, as the Department of Defense. Three Undersecretaries are provided: For the Army, for the Navy, and for National Resources.

(b) The nonmilitary engineering activities of the War Department, including the Board of Engineers for Rivers and Harbors, the District and Division Engineer Offices, the Mississippi River and California Débris Commissions, the Board of Road Commissioners for Alaska, and the Office of Public Buildings and Grounds (District of Columbia), are transferred to the Department of the Interior.

(c) The marine activities of the War Department, including the Lake Survey Office, the Inland and Coastwise Waterways Service, and the Supervisor of New York Harbor, are transferred to the Department of Commerce.

(d) The Bureau of Insular Affairs is transferred from the War Department to the Department of State.

(e) The Hydrographic Office and the Naval Observatory are transferred from the Navy Department to the Department of Commerce.

(f) The Revenue Cutter Service, now a part of the Coast Guard in the Treasury Department, is transferred from that department to the Naval Establishment.

## DEPARTMENT OF THE INTERIOR.

(a) The Interior Department is given two major functions: The administration of the public domain and the construction and maintenance of public works. The subdivisions of the de-

<sup>1</sup> A Bureau of Purchase and Supply is proposed, to be an independent establishment. It would assume the functions now performed by the General Supply Committee.

<sup>2</sup> The Coast Guard is now composed of the former Revenue Cutter and Life Saving Services (consolidated by the act approved Jan. 28, 1915). It is proposed that the Revenue Cutter Service shall be transferred to the Naval Establishment (Department of Defense) and the Life Saving Service to the Department of Commerce.

partment are grouped accordingly under two Assistant Secretaries.

(b) The educational and health activities of the department, including the Bureau of Education, Indian Schools, Howard University, the Columbia Institution for the Deaf, St. Elizabeths Hospital, and Freedmen's Hospital, together with the Bureau of Pensions, are transferred to the new Department of Education and Welfare.

(c) The Bureau of Mines<sup>1</sup> and the Patent Office are transferred to the Department of Commerce.

(d) The nonmilitary engineering activities of the War Department<sup>2</sup> are transferred to the Department of the Interior, as is also control over the National Military Parks.

(e) The Supervising Architect's Office is transferred from the Treasury Department to the Department of the Interior.

(f) The Bureau of Public Roads is transferred from the Department of Agriculture to the Department of the Interior.

(g) The functions of the Federal Power Commission, an independent establishment, are transferred to the Department of the Interior.

#### DEPARTMENT OF JUSTICE.

(a) The solicitors of the several departments, now nominally under the control of the Department of Justice, are transferred to the departments to which they are respectively attached.

(b) The Office of the Alien Property Custodian, now an independent establishment, is transferred to the Department of Justice.

(c) The administration of United States prisons is transferred from the Department of Justice to the Department of Education and Welfare.

#### DEPARTMENT OF COMMUNICATIONS.

(a) The Post Office Department is renamed as the Department of Communications. The only important change contemplated is the addition of a bureau to develop and extend telephone and telegraph communications, including wireless, for the general public benefit.

<sup>1</sup> Except the Government fuel yards, which is to become a part of the proposed Bureau of Purchase and Supply (independent).

<sup>2</sup> See (b) under War and Navy Departments, above.



## DEPARTMENT OF AGRICULTURE.

(a) The Bureau of Public Roads is transferred to the Department of the Interior.

(b) The Botanic Garden is transferred from congressional supervision to the control of the Department of Agriculture.

## DEPARTMENT OF COMMERCE.

(a) The Department of Commerce is given three major functions: The promotion of industry, the promotion of trade, and the development, regulation, and protection of the merchant marine. The subdivisions of the department are organized accordingly, under three Assistant Secretaries.

(b) The Bureau of Mines and the Patent Office are transferred to the Department of Commerce from the Department of the Interior, as well as the compilation of statistics of mineral production.<sup>1</sup>

(c) The Lake Survey, the Inland and Coastwise Waterways Service, the supervisor of New York Harbor, and the compilation of statistics of internal commerce are transferred from the War Department to the Department of Commerce.

(d) The Hydrographic Office and the Naval Observatory are transferred from the Navy Department to the Department of Commerce.

(e) The Life Saving Service is transferred from the Treasury Department (Coast Guard) to the Department of Commerce, which is given control likewise over the United States Section of the Inter-American High Commission, now in the Treasury Department.

## DEPARTMENT OF LABOR.

(a) The functions of the Women's and Children's Bureaus, except such as relate to women and children in industry, are transferred to the Department of Education and Welfare.

## DEPARTMENT OF EDUCATION AND WELFARE.

(a) This is a new department, to have four major subdivisions, each in charge of an Assistant Secretary, as follows:

Education.

Health.

Social Service.

Veteran Relief.

<sup>1</sup> Statistics of mineral production are compiled by the Geological Survey, of the Interior Department.

(b) Existing bureaus and offices to be transferred to the Department of Education and Welfare are as follows:

From the Department of the Interior:

- Bureau of Education.
- Indian schools.
- Howard University.
- St. Elizabeths Hospital.
- Freedmen's Hospital.
- Bureau of Pensions.

From the Department of Labor:

- Women's Bureau (part).
- Children's Bureau (part).

From the Treasury Department:

- Public Health Service.

From the War Department:

- Soldiers' Home.

From the Department of Justice:

- Office of the Superintendent of Prisons.

Independent establishments:

- Smithsonian Institution.<sup>1</sup>
- Federal Board for Vocational Education.
- National Home for Disabled Volunteer Soldiers.
- Columbia Institution for the Deaf.
- Veterans' Bureau.

#### INDEPENDENT ESTABLISHMENTS.

(a) To the greatest possible extent, the existing independent establishments have been placed under the administrative supervision of some department. Only those remain which are quasi-judicial in character, necessitating a board or commission form of organization, or which perform a service function for all branches of the Government. These are as follows:

Commissions, boards, etc.:

- Civil Service Commission.
- Shipping Board.
- Emergency Fleet Corporation.
- Tariff Commission.
- Interstate Commerce Commission.
- Federal Trade Commission.

<sup>1</sup> There is some doubt, considering the legal character of the Smithsonian Institution, whether it can be incorporated in a Government department. Its functions, however, are in harmony with those of the proposed Department of Education and Welfare, and the propriety of its inclusion therein is unquestioned if it can legally be accomplished.

Federal Reserve Board.  
War Finance Corporation.  
Coal Commission.  
Railroad Administration.  
Railroad Labor Board.  
World War Foreign Debt Commission.  
Service bureaus and offices:  
Bureau of the Budget.  
Government Printing Office.  
Bureau of Efficiency.  
Bureau of Purchase and Supply.  
Government Fuel Yards.

#### **b. Plan of the Joint Committee on Reorganization**

[*House Document No. 356*, 68 Cong., 1 Sess., pp. 8-13.]

#### **THE COMMITTEE'S RECOMMENDATIONS**

The foregoing sketch of the historical development of the executive branch of the Government touches only the high spots in the growth of Federal administrative agencies. Needless to say the details of form and organization in the many Government departments are constantly changing as the result of congressional and administrative action. Hardly a session of Congress passes without the enactment of legislation creating new executive agencies, transforming old ones, or imposing new or larger duties upon existing establishments. Hardly a year goes by when some executive department does not organize a new bureau or division for the purpose of carrying out new requirements of law.

This it is important to remember in considering the organization of the executive branch of the Government and the present distribution of work among the services of which it is composed. The departments and establishments are not more than the instruments made available to carry into execution the laws from time to time enacted by Congress. In form and organization, therefore, they have always been, and must continue to be, sensitive to the action of successive Congresses in modifying or repealing existing laws and in writing new ones. Congress passes the reclamation act, for instance, putting into force under the Secretary of the Interior the policy of reclaiming arid lands. Immediately there comes into existence under the Department of the Interior the administrative organization necessary to carry out the law. Congress passes the insecticide and fungicide act, provid-

ing for the Federal inspection of insecticides and fungicides entering interstate commerce. It is at once necessary to set up an organization to enforce the procedure prescribed. The work is intrusted to the Department of Agriculture, which appears to have jurisdiction of the interests most vitally affected, and there soon appears the Insecticide and Fungicide Board.

In such cases Congress is interested in providing for specific governmental action. It intrusts the action to whatever agency already in existence seems in all the circumstances to be best equipped to act. If no existing agency is available, it creates or authorizes a new organization to handle the business, sometimes making it a part of one of the executive departments, sometimes making it an establishment independent of any executive department, and sometimes making it interdepartmental; that is, subject to the joint control of two or more department heads. It is probably true that Congress is usually less interested in the selection of the agency through which the Government is to act than in reaching the decision as to what the action shall be. Not infrequently the selection turns upon such considerations as the individualities of the heads of particular offices and their personal fitness to direct the business in project. Usually, at any rate, it rests upon wholly practical grounds, and as the result the assignments of particular activities to particular agencies are not always entirely logical or defensible from theoretical points of view.

In a sense, then, the executive branch of the Government is a composite resulting from the action of successive Congresses, each of which adds to and subtracts from the duties of existing bureaus and offices and occasionally creates new agencies as it prescribes new functions. It is but natural under these circumstances to find some need for reorganization, involving the simultaneous consideration of the work done by all services and such rearrangements as may be necessary to reduce duplications of activities and to bring about more effective administration. This need, which might be apparent at any time, was undoubtedly made more pressing by reason of the expansion of the services as a result of the war with Germany.

The irregularities of organization which exist in the executive establishments to-day are probably well known to everyone who follows public affairs. Unanimity of opinion in matters of detail is not found among students of Government, and of course could not be expected. But there is substantial agreement that attention should be given to three points: First, the presence in certain

departments of bureaus or offices which perform functions having little or no apparent relation to the major departmental purposes; second, the maintenance by two or more departments of agencies which do work in the same or analogous fields of activity; and, third, the existence of a considerable number of governmental agencies outside the 10 executive departments.

In the main these conditions are so evident that it is hardly necessary to discuss them at any length as matters of fact. The Treasury Department furnishes a good example of the condition first cited. It is the fiscal agency of the Government. But in addition to its fiscal bureaus it includes such patently nonfiscal establishments as the Public Health Service and the Supervising Architect's Office. The War Department embraces a large organization engaged in public works of a strictly civil character. The administration of national forests and of the Government's public-roads program is intrusted to the Department of Agriculture, although on their face these matters seem to have but an indirect relation to the major functions of that department. And so it goes. There is hardly a department which does not have some administrative task or other which has no apparent connection with the larger problems absorbing its chief interest.

It should not be supposed, however, that these cases invariably represent structural defects—that they are irregularities which must be eliminated in order to pave the way to effective administration. Some cases are of course fairly obvious. The Treasury Department, for instance, makes no secret of its desire to be rid of the nonfiscal functions which it now exercises, frankly acknowledging not only that they constitute a real embarrassment to the fiscal work of the department, but also that the departmental officers are not able to give expert supervision to such diversified nonfiscal matters as are represented by the Supervising Architect's Office and the Public Health Service. In the case of the War Department and the Department of Agriculture, on the other hand, the facts are not so clear. There are those who believe strongly that much or all of the civil work of the War Department should be permitted to remain in its present status, and those again who believe that the presence of the Bureau of Public Roads and the Forest Service in the Department of Agriculture is amply justified on theoretical as well as practical grounds. One of the most perplexing matters presented by the reorganization problem is to determine the proper action to be taken in such instances as these.

The second of the conditions cited is the scattering among sev-

eral departments of agencies which work in substantially the same fields. It might be more accurate to characterize this as the performance by two or more departments or establishments of the same or similar functions—functions which tend to conflict or overlap—for it is this condition which has given rise to the charges commonly made of duplication of work. As illustrating this condition it may be pointed out that marine charts are published and distributed and hydrographic surveys made by three departments—Commerce, War, and Navy—each of which maintains an organization exclusively for this purpose. Both the Veterans' Bureau, an independent establishment, and the Bureau of Pensions, of the Department of the Interior, attend to the claims of veterans of our wars, while the institutional care of our ex-soldiers and sailors is divided among three departments and two independent establishments. These examples could be multiplied almost without limit. Here again the solution is not obvious. There are always reasons—sometimes sufficient reasons—for the arrangement which prevails in any of these matters. And almost invariably any realignment which may be proposed presents complicated controversial aspects. But as a general proposition it is true that there are many cases where agencies working in the same field in different establishments could, in the long run, be more satisfactorily administered if brought together under the same departmental supervision.

The importance of the third condition enumerated is indicated to some extent by the fact that there now exist in the executive branch of the Government almost 30 bureaus, offices, boards, or commissions which maintain their existence independently of the 10 executive departments. The independent status of most of these organizations is completely justified; but there are some which do work that lies in the same direction as the work of certain of the executive departments. So far as practicable these should be abolished and their duties combined with those performed by the departments having the supervision of members of the President's Cabinet.

Very accurately Congress appraised the situation in its resolution establishing the Joint Committee on Reorganization. It required the committee to determine two things: First, what redistribution of work should be made among Government agencies, spoken of as services; and, second, what regrouping of the services themselves should be made among the departments. According to section 2 of the resolution, the object to be achieved by the redistribution of work among the services is the better correlation

of the efforts of Government agencies which work in the same or related fields. And the departmental regrouping of services is to be such a reordering of the several agencies of the Government that each executive department "shall embrace only services having close working relations with each other and ministering directly" to a common purpose.

With these objects in mind the committee submits the following recommendations:

I. The establishment of a new department, to be known as the department of education and relief, and the concentration under that department of the scattered agencies which now perform work in the fields of public health, public education, and the care of veterans. Specifically these are: The Bureau of Pensions, the Bureau of Education, St. Elizabeths Hospital, Howard University, and Freedmen's Hospital, all now situated in the Interior Department; the Public Health Service, now in the Treasury Department; and the Veterans' Bureau, an independent establishment. The committee also recommends that the new department assume the functions now performed by the Federal Board for Vocational Education; and that it be given the nominal supervision of the Columbia Institution for the Deaf, now exercised by the Department of the Interior. It is further recommended that the National Home for Disabled Volunteer Soldiers be associated with the department of education and relief, and required to transmit its accounts, reports, and estimates of appropriations through the head of that department.

II. The transfer to the Department of Commerce of certain agencies now situated in other departments whose work is in the field which the Department of Commerce was established to cover. These are: The Bureau of Mines and the Patent Office, now in the Department of the Interior; the Lake Survey Office, now under the Chief of Engineers, United States Army; the Inland and Coastwise Waterways Service, now under the War Department; and the independent National Advisory Committee for Aeronautics. The committee also recommends the transfer from the Geological Survey and the War Department, respectively, to the Bureau of the Census, of the work of collecting and publishing statistics of mineral production and of water-borne commerce; and the establishment of a new bureau in the Department of Commerce to be known as the bureau of transportation.

III. The erection in the Interior Department of two subdivisions, one charged with the administration of the public domain, the other with the administration of public engineering

works; the withdrawal from the Interior Department of all functions not connected with public works or with the public domain; and, comports with the foregoing, the transfer to that department of the Bureau of Public Roads from the Department of Agriculture and the Supervising Architect's Office from the Treasury Department. The committee also recommends the discontinuance of the Board of Road Commissioners for Alaska and the transfer of the Board's functions to the Interior Department.

IV. The creation of a centralized purchasing agency for the Government, to be known as the bureau of purchase and supply.

V. The creation of an office to be known as the office of public buildings and parks in the District of Columbia, which will assume the functions now performed by two separate offices—the Office of Public Buildings and Grounds, under the War Department, and the Office of the Superintendent of the State, War, and Navy Department Buildings.

VI. The transfer of the departmental solicitors from the Department of Justice to the executive departments which they serve.

VII. The removal of the Bureau of the Budget from its nominal connection with the Treasury Department and its establishment as an independent office directly under the control of the President.

Most of the changes proposed by the committee were included in the plan submitted by the President on February 13, 1923. Due to a variety of reasons, however, the committee, after a careful consideration of the many aspects of its problem, was unable to concur in all the suggestions coming from the Chief Executive; but it feels that the proposals which are now made go directly to the point of correcting, so far as it is now possible for Congress to do so, the most prominent faults which characterize the organization of the executive branch of the Government. Generally speaking, their adoption would result, first, in removing from all departments those functions, extraneous to the major departmental purposes, which interfere with effective administration or which, being secondary, are not vigorously handled; second, in assembling under the same departmental supervision all activities which are closely related and which, therefore, should be coordinated in administration; and, third, the extension of the control of the Cabinet officers to reach all matters save those which must, in the nature of things, be handled by agencies independent of the regular departmental organization.



## 52. ESTABLISHMENT OF THE MERIT SYSTEM

The method of filling the numerous positions under the national government, particularly those of a minor and clerical nature, has always been a difficult question. Even Washington, with his honesty of purpose and high ideals, refused to appoint to office those who were definitely antagonistic to his policies, and to that extent made appointments on a political basis. Few removals were made in these minor positions, however, during the early administrations, and not until the time of Jackson did the spoils system become well established. Efforts to reform the civil service were made continuously for some time before the Civil War, and Congress in 1871 yielded to the pressure for reform by passing a mild and generally ineffective law. Finally, as the result of continued demands, and particularly as the result of the assassination of President Garfield by a disappointed office-seeker, Congress in 1883 passed the so-called Pendleton Act, which, together with the Classification Act of 1923 and the Retirement Act of 1926, constitutes the great charter of the national civil service.

### a. Civil Service Act of 1883

[*U. S. Statutes*, vol. 22, pp. 403-407.]

An act to regulate and improve the civil service of the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of whom shall be adherents of the same party, as Civil Service Commissioners, and said three commissioners shall constitute the United States Civil Service Commission. Said commissioners shall hold no other official place under the United States.

The President may remove any commissioner; and any vacancy in the position of commissioner shall be so filled by the President, by and with the advice and consent of the Senate, as to conform to said conditions for the first selection of commissioners. . . .

SECTION 2. That it shall be the duty of said commissioners:

First. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect.

Second. And, among other things, said rules shall provide

and declare, as nearly as the conditions of good administration will warrant, as follows:

First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

Second, that all the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.

Third, appointments to the public service aforesaid in the departments at Washington shall be apportioned among the several States and Territories and the District of Columbia upon the basis of population as ascertained at the last preceding census. Every application for an examination shall contain, among other things, a statement, under oath, setting forth his or her actual bona fide residence at the time of making the application, as well as how long he or she has been a resident of such place.

Fourth, that there shall be a period of probation before any absolute appointment or employment aforesaid.

Fifth, that no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

Sixth, that no person in said service has any right to use his official authority or influence to coerce the political action of any person or body.

Seventh, there shall be non-competitive examinations in all proper cases before the commission, when competent persons do not compete, after notice has been given of the existence of the vacancy, under such rules as may be prescribed by the commissioners as to the manner of giving notice.

Eighth, that notice shall be given in writing by the appointing power to said commission of the persons selected for appointment or employment from among those who have been examined, of the place of residence of such persons, of the rejection of any such persons after probation, of transfers, resignations, and removals, and of the date thereof, and a record of the same shall be kept by said commission. And any necessary exceptions from said eight fundamental provisions of the rules shall be set forth

in connection with such rules, and the reasons therefor shall be stated in the annual reports of the commission.

Third. Said commission shall, subject to the rules that may be made by the President, make regulations for, and have control of, such examinations, and, through its members or the examiners, it shall supervise and preserve the records of the same; and said commission shall keep minutes of its own proceedings.

Fourth. Said commission may make investigations concerning the facts, and may report upon all matters touching the enforcement and effects of said rules and regulations, and concerning the action of any examiner or board of examiners hereinafter provided for, and its own subordinates, and those in the public service, in respect to the execution of this act.

Fifth. Said commission shall make an annual report to the President for transmission to Congress, showing its own action, the rules and regulations and the exceptions thereto in force, the practical effects thereof, and any suggestions it may approve for the more effectual accomplishment of the purposes of this act.

SECTION 6. . . . That from time to time said Secretary [of the Treasury], the Postmaster-General, and each of the heads of departments mentioned in the one hundred and fifty-eighth section of the Revised Statutes, and each head of an office, shall, on the direction of the President, and for facilitating the execution of this act, respectively revise any then existing classification or arrangement of those in their respective departments and offices, and shall, for the purposes of the examination herein provided for, include in one or more of such classes, so far as practicable, subordinate places, clerks, and officers in the public service pertaining to their respective departments not before classified for examination.

SECTION 7. That after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with

this act conferred by the seventeen hundred and fifty-third section of said statutes; nor shall any officer not in the executive branch of the government, or any person merely employed as a laborer or workman, be required to be classified hereunder; nor, unless by direction of the Senate, shall any person who has been nominated for confirmation by the Senate be required to be classified or to pass an examination.

SECTION 8. That no person habitually using intoxicating beverages to excess shall be appointed to, or retained in, any office, appointment, or employment to which the provisions of this act are applicable.

SECTION 9. That whenever there are already two or more members of a family in the public service in the grades covered by this act, no other member of such family shall be eligible to appointment to any said grades.

SECTION 10. That no recommendation of any person who shall apply for office or place under the provisions of this act which may be given by any Senator or member of the House of Representatives, except as to the character or residence of the applicant, shall be received or considered by any person concerned in making any examination or appointment under this act.

SECTION 11. That no Senator, or Representative, or Territorial Delegate of the Congress, or Senator, Representative, or Delegate elect, or any officer or employee of either of said houses, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, branch or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States.

SECTION 12. That no person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in this act, or in any navy-yard, fort, or arsenal, solicit in any manner whatever, or receive any contribution of money or any other thing of value for any political purpose whatever.

SECTION 13. No officer or employee of the United States mentioned in this act shall discharge, or promote, or degrade, or in manner change the official rank or compensation of any other

officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.

SECTION 14. That no officer, clerk, or other person in the service of the United States shall, directly or indirectly give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of the House of Representatives, or Territorial Delegate, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever.

SECTION 15. That any person who shall be guilty of violating any provision of the four foregoing sections shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding five thousand dollars, or by imprisonment for a term not exceeding three years, or by such fine and imprisonment both, in the discretion of the court.

Approved, January sixteenth, 1883.

#### b. Classification Act of 1923

[*U. S. Statutes at Large*, vol. 42, pp. 1488-1499.]

CHAP. 265.—An Act To provide for the classification of civilian positions within the District of Columbia and in the field services.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as "The Classification Act of 1923."

SEC. 3. That there is hereby established an ex officio board, to be known as the Personnel Classification Board, to consist of the Director of the Bureau of the Budget or an alternate from that Bureau designated by the Director, a member of the Civil Service Commission or an alternate from that commission designated by the commission, and the Chief of the United States Bureau of Efficiency or an alternate from that bureau designated by the chief of the bureau. The Director of the Bureau of the Budget or his alternate shall be chairman of the board.

Subject to the approval of the President, the heads of the departments shall detail to the board, at its request, for temporary service under its direction, officers or employees possessed of special knowledge, ability, or experience required in the

classification and allocation of positions. The Civil Service Commission, the Bureau of the Budget, and the Bureau of Efficiency shall render the board such cooperation and assistance as the board may require for the performance of its duties under this Act.

The board shall make all necessary rules and regulations not inconsistent with the provisions of this Act and provide such subdivisions of the grades contained in section 13 hereof and such titles and definitions as it may deem necessary according to the kind and difficulty of the work. Its regulations shall provide for ascertaining and recording the duties of positions and the qualifications required of incumbents, and it shall prepare and publish an adequate statement giving (1) the duties and responsibilities involved in the classes to be established within the several grades, illustrated where necessary by examples of typical tasks, (2) the minimum qualifications required for the satisfactory performance of such duties and tasks, and (3) the titles given to said classes. In performing the foregoing duties, the board shall follow as nearly as practicable the classification made pursuant to the Executive order of October 24, 1921. The board may from time to time designate additional classes within the several grades and may combine, divide, alter, or abolish existing classes. Department heads shall promptly report the duties and responsibilities of new positions to the board. The board shall make necessary adjustments in compensation for positions carrying maintenance and for positions requiring only part-time service.

SEC. 4. That after consultation with the board, and in accordance with a uniform procedure prescribed by it, the head of each department shall allocate all positions in his department in the District of Columbia to their appropriate grades in the compensation schedules and shall fix the rate of compensation of each employee thereunder, in accordance with the rules prescribed in section 6 herein. Such allocations shall be reviewed and may be revised by the board and shall become final upon their approval by said board. Whenever an existing position or a position hereafter created by law shall not fairly and reasonably be allocable to one of the grades of the several services described in the compensation schedules, the board shall adopt for such position the range of compensation prescribed for a grade, or a class thereof, comparable therewith as to qualifications and duties.

In determining the rate of compensation which an employee

shall receive, the principle of equal compensation for equal work irrespective of sex shall be followed.

. . . . .

SEC. 7. Increases in compensation shall be allowed upon the attainment and maintenance of the appropriate efficiency ratings, to the next higher rate within the salary range of the grade: *Provided however*, That in no case shall the compensation of any employee be increased unless Congress has appropriated money from which the increase may lawfully be paid, nor shall the rate for any employee be increased beyond the maximum rate for the grade to which his position is allocated. Nothing herein contained shall be construed to prevent the promotion of an employee from one class to a vacant position in a higher class at any time in accordance with civil service rules, and when so promoted the employee shall receive compensation according to the schedule established for the class to which he is promoted.

SEC. 8. That nothing in this Act shall modify or repeal any existing preference in appointment or reduction in the service of honorably discharged soldiers, sailors, or marines under any existing law or any Executive order now in force.

SEC. 9. That the board shall review and may revise uniform systems of efficiency rating established or to be established for the various grades or classes thereof, which shall set forth the degree of efficiency which shall constitute ground for (a) increase in the rate of compensation for employees who have not attained the maximum rate of the class to which their positions are allocated, (b) continuance at the existing rate of compensation without increase or decrease, (c) decrease in the rate of compensation for employees who at the time are above the minimum rate for the class to which their positions are allocated, and (d) dismissal.

The head of each department shall rate in accordance with such systems the efficiency of each employee under his control or direction. The current ratings for each grade or class thereof shall be open to inspection by the representatives of the board and by the employees of the department under conditions to be determined by the board after consultation with the department heads.

Reductions in compensation and dismissals for inefficiency shall be made by heads of departments in all cases whenever the efficiency ratings warrant, as provided herein, subject to the approval of the board.

. . . . .

SEC. 12. That it shall be the duty of the board to make a study of the rates of compensation provided in this Act for the various services and grades with a view to any readjustment deemed by said board to be just and reasonable. Said board shall, after such study and at such subsequent times as it may deem necessary, report its conclusions to Congress with any recommendations it may deem advisable.

SEC. 13. That the compensation schedules be as follows:

The professional and scientific service shall include all classes of positions the duties of which are to perform routine, advisory, administrative, or research work which is based upon the established principles of a profession or science, and which requires professional, scientific, or technical training equivalent to that represented by graduation from a college or university of recognized standing. [This service is subdivided into seven grades, with a scale of salaries for each grade.] . . .

The subprofessional service shall include all classes of positions the duties of which are to perform work which is incident, subordinate, or preparatory to the work required of employees holding positions in the professional and scientific service, and which requires or involves professional, scientific, or technical training of any degree inferior to that represented by graduation from a college or university of recognized standing. [This service is subdivided into eight grades, with a scale of salaries for each grade.] . . .

The clerical, administrative, and fiscal service shall include all classes of positions the duties of which are to perform clerical, administrative, or accounting work, or any other work commonly associated with office, business, or fiscal administration. [This service is subdivided into fourteen grades, with a scale of salaries for each grade.] . . .

The custodial service shall include all classes of positions the duties of which are to supervise or to perform manual work involved in the custody, maintenance, and protection of public buildings, premises, and equipment, the transportation of public officers, employees or property, and the transmission of official papers. [This service is subdivided into ten grades, with a scale of salaries for each grade.] . . .

The clerical-mechanical service shall include all classes of positions which are not in a recognized trade or craft and which are located in the Government Printing Office, the Bureau of Engraving and Printing, the Mail Equipment shop, the duties of which are to perform or to direct manual or machine opera-



tions requiring special skill or experience, or to perform or direct the counting, examining, sorting, or other verification of the product of manual or machine operations. [This service is subdivided into five grades, with a scale of salaries for each grade.]

. . . . .

Approved, March 4, 1923.

### 53. EXTENSION OF THE MERIT SYSTEM

The power to determine what positions in the national administration shall be placed under the civil service rules is vested primarily in Congress. That body has accordingly provided from time to time, as new offices or positions have been created, whether to include those in the system known as the classified service and in that way has extended the scope of the merit system. Congress has also given the President power to make rules governing the civil service, and to determine within certain limits the application of those rules. Obviously the President may also, if he chooses, impose conditions with respect to appointments to those offices filled by himself. Hence it is that the merit system has been extended to more and more offices by presidential order. President Cleveland, a vigorous exponent of the civil service, thus placed approximately 45,000 positions under the protection of the civil service rules during the four years of his second term, more than doubling the scope of the service. Similarly, other Presidents have made additions from time to time, the most notable of recent years being the inclusion of postmasters by Presidents Wilson and Harding.

#### a. Extension by Act of Congress

[*U. S. Statutes*, vol. 44, pt. 1, pp. 1381-1383.]

An Act to create a Bureau of Customs and a Bureau of Prohibition in the Department of the Treasury.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there shall be in the Department of the Treasury a bureau to be known as the Bureau of Customs, a bureau to be known as the Bureau of Prohibition, a Commissioner of Customs, and a Commissioner of Prohibition. The Commissioner of Customs shall be at the head of the Bureau of Customs, and the Commissioner of Prohibition shall be at the head of the Bureau of Prohibition. The Commissioner of Customs and the Commissioner of Prohibition shall be appointed by the Secretary of the Treasury, without regard to the civil service laws, and each shall receive a salary at the rate of \$8,000 per annum.

SEC. 2. (a) The Secretary of the Treasury is authorized to appoint, in each of the bureaus established by section 1, one as-

sistant commissioner, two deputy commissioners, one chief clerk, and such attorneys and other officers and employees as he may deem necessary. One of the deputy commissioners of the Bureau of Customs shall have charge of investigations. Appointments under this subdivision shall be subject to the provisions of the civil service laws, and the salaries shall be fixed in accordance with the Classification Act of 1923.

. . . . .

SEC. 5. (b) The Commissioner of Prohibition, with the approval of the Secretary of the Treasury, is authorized to appoint in the Bureau of Prohibition such employees in the field service as he may deem necessary, but all appointments of such employees shall be made subject to the provisions of the civil service laws, notwithstanding the provisions of section 38 of the National Prohibition Act, as amended. The term of any person who is transferred, under this section, to the Bureau of Prohibition, and who was not appointed subject to the provisions of the civil service laws, shall expire upon the expiration of six months from the effective date of this Act.

. . . . .

SEC. 7. This Act shall take effect on April 1, 1927.

Approved, March 3, 1927.

#### **b. President Wilson's Executive Order of March 31, 1917**

[*Congressional Record*, vol. 58, p. 5832.]

### **EXECUTIVE ORDER**

Hereafter when a vacancy occurs in the position of postmaster of any office of the first, second, or third class as the result of death, resignation, removal, or, on the recommendation of the First Assistant Postmaster General, approved by the Postmaster General, to the effect that the efficiency or needs of the service requires that a change shall be made, the Postmaster General shall certify the fact to the Civil Service Commission, which shall forthwith hold an open competitive examination to test the fitness of applicants to fill such vacancy, and when such examination has been held and the papers in connection therewith have been rated, the same commission shall certify the result thereof to the Postmaster General, who shall submit to the President the name of the highest qualified eligible for appointment to

fill such vacancy,<sup>1</sup> unless it is established that the character or residence of such applicant disqualifies him for appointment. No person who has passed his sixty-fifth birthday shall be given the examination herein provided for.

WOODROW WILSON.

## 54. WORKING OF THE CIVIL SERVICE

Politicians have never been satisfied with the extensions of the civil service, since the system serves to remove offices from their control. Others have feared the extensions as tending to create a bureaucracy, or class of permanent office-holders, and as interfering seriously with the responsible and efficient operation of the government. These views and tendencies are indicated by the following.

### a. View of William Dudley Foulke, Acting President of the National Civil Service Reform League

[*N. Y. Times*, Aug. 6, 1922.]

The merit system of appointment to the civil service of the United States has been under organized attack by the spoilsmen in Congress and in high places in the executive departments.

When this accusation was made to the persons responsible for these attacks it was met with vehement denial. They insisted that there was no intention to overthrow the merit system—all that was wanted was to have men appointed who were in sympathy with the policies of the party in power. Since the accusation was made there has developed an organized attempt, through syndicated newspaper statements on the part of the spoilsmen of the Administration, to reassure the public and to tell them that no harm to the civil service system was intended.

But let us see what has happened. The country was startled not long ago by the removal of the Director and thirty-one subordinate officials of the Bureau of Engraving and Printing, without notice or the assignment of any reason, in direct violation of the provisions of the act of Aug. 24, 1912.

The country was shocked more recently by the publication of a reported demand of 164 Republican Congressmen for wholesale dismissals in the Treasury Department to make places on the Government payrolls for "deserving" Republicans who had been of service in the 1920 political campaign.

<sup>1</sup> President Harding, by executive orders of May 10 and July 27, 1921, modified this provision so as to require the submission of the names of the three highest eligibles.

In these two occurrences the undercover fight for restoration of the spoils system came momentarily into the open, and the spoilsmen received their well-merited measure of public condemnation. The merit system will stand in little danger if the public can be acquainted with the facts and thus enabled to fix responsibility for the present movement.

Civil service reform has made substantial progress in recent times, but a reaction against it among professional politicians of the successful party was to be expected after the last election. For eight years the opposite political party had been in power and "the boys back home" were "hungry for pie."

When the new Administration took office, politicians appointed to high places found themselves surrounded by subordinates who had worked under officials of the opposite political party. Since civil service rules forbid the removal of Federal employes on account of their political beliefs or affiliations, the new officials were able to bring to Washington relatively few of the men who had worked with them in the political campaign. Extravagant promises of appointments had been made by some of these officials and the promises could not be made good.

In the Republican landslide many men were swept into Congress whose chances of re-election are very slim. These men are anxious, therefore, to get all they can in the way of patronage "while the getting is good," but they find the Civil Service law standing in the way.

In view of all these facts, the development in Congress and in the Cabinet of a movement to ham-string the Civil Service law is not surprising. It is a testimonial to the effectiveness of the system against which it is aimed. The first clear indication of what might be expected came in May, 1921, when President Harding issued an order modifying a previous one of President Wilson, regulating the appointment of Presidential postmasters, Mr. Harding did not yield all the spoilsmen wanted, which was a complete shaking off of the Wilson order. He compromised with them instead.

President Wilson's order called for the nomination of the applicant standing highest in the civil service examinations, but it applied only to the filling of vacancies caused by death, resignation or removal, and affected only a small percentage, less than one-fifth, of the total number of Presidential postmasterships.

President Harding's order permitted the selection of any one of the three candidates standing highest in the eligible list. Presumably one of these would be a Republican. At the same time

it applied the new rule to the filling of all vacancies, no matter how they might develop, including vacancies caused by the expiration of the incumbent's term of office.

Spoilsmen in Congress who had promised postmasterships were not entirely satisfied with this order. It hampered them in carrying out their promises, for the man desired might not reach a place among the three highest. They were still further hampered by the attitude of Postmaster General Will H. Hays. Mr. Hays regarded his department not as a political bribery chest, but as a business organization. He resisted the replacement of efficient employes by political henchmen.'

But Mr. Hays resigned after having served one year as Postmaster General and he was succeeded by Dr. Hubert Work. Dr. Work has openly expressed the view that examinations for Presidential postmasters should be taken out of the jurisdiction of the Civil Service Commission and the the Post Office Department should hold its own examinations for these places. Dr. Work's first assistant, John H. Bartlett, opened a campaign through the publicity channels of the Post Office Department to bring about the removal of higher salaried positions from the classified service, on the ground, as he contended, that the original sponsors of the civil service system never intended that it should apply to offices paying salaries above \$1,800 a year. He has not yet succeeded in the removal of any of those places from the classified service.

But the attacks of the spoilsmen were not limited to the Post Office Department. The more recent storm centre of the movement was in the Treasury. The work of this department has been enormously expanded during recent years and many thousands of employes added to its payrolls. It therefore offers as attractive a field for the spoilsmen as the Post Office Department has been in the past; in some respects even more attractive, for its employes are better paid. It is true that efficiency in the Treasury Department is vital to the welfare of the nation and that most of the work is highly specialized and can be efficiently performed only by men and women with special training and experience. But these considerations weigh lightly against the appetites of the spoilsmen. The full force of the spoils campaign was concentrated against those officials who resisted patronage raids in the Treasury Department.

The story begins with the appointment in December, 1921, of Elmer Dover, former Secretary to the late Mark A. Hanna, to be Assistant Secretary of the Treasury in charge of the Customs

Service and the Internal Revenue Service. Mr. Dover lost no time in making it known that he had received a commission to "Hardingize" these branches of the service, that is, to replace Democratic officials with Republican appointees. Trained employes soon began to be missed from their accustomed places in the Customs Service. Their desks were taken by Republican politicians. These changes, however, by promotion, transfers, and demotions were made in such a manner as not to violate the express terms of the Civil Service act.

Mr. Dover scored his first important success on March 31, 1921, when President Harding was induced to sign the order dismissing thirty-two employes of the Bureau of Engraving and Printing. The President could not have signed this order had he received more competent advice, for its provisions violated three separate Federal statutes.

The method taken to obtain these places was as cruel as any that could have been devised. A stigma was placed upon the employes removed. They lost not only their positions, but probably their civil service status as well, so that it might become impossible for them to get re-employment under normal civil service procedure. Many of them lost valuable rights under the retirement law. All concerned were kept from having any knowledge of the impending order until the evening it was issued. To this day, they state, they do not know the reason for their removal.

After the raid in the Bureau of Engraving and Printing, Mr. Dover's activities began to encounter stiff opposition from Secretary of the Treasury Mellon and Commissioner of Internal Revenue Blair. It was evident that the work of the department soon would be completely demoralized if similar raids were permitted in other divisions.

Henchmen of Mr. Dover were thereafter separated from their positions in the Bureau of Internal Revenue upon charges brought by Mr. Blair. Official records taken from the files of the Treasury Department were found at the home of one of these employes. Among other correspondence, letters were discovered giving details of a plan whereunder the Commissioner of Internal Revenue was to be replaced by one of the suspended men and "then things would be made so uncomfortable for Mellon that he would resign and be succeeded by Dover."

In this situation the circulation of the petition that gained an unpleasant notoriety for its sponsors was begun among the Republican spoilsmen of the House. This petition was erroneously

reported to specify by name some 150 alleged Democrats holding office in the Treasury Department and to demand their dismissal. The names appeared in an anonymous document circulated simultaneously with the petition, but not a part of it. The petition was shown by Representative Begg of Ohio, who circulated it, to a representative of the National Civil Service Reform League. It read somewhat as follows:

"We, the undersigned Republican friends of the President in Congress, wish to express to him our complete confidence in the ability of Elmer Dover to carry out the task to which he has been assigned."

This petition obtained the signatures of 164 Republican Congressmen. The document, read by itself, sounds harmless enough. Why not praise a good man, a good Republican, the former political Secretary of Mark Hanna, who wanted to bring the full dinner pail to every Republican? But the circumstances under which it was sent to the President gave it a different significance, enhanced by the statement of Mr. Begg that the petition was not prepared by "any scrub Congressman." It was prepared, he said, by "one of the highest officials of the Government . . . high above Mr. Dover." When these facts are taken into account, the petition assumes the appearance of a demand, engineered by the leader of the spoilsmen.

Repeated rumors of the impending resignation of Mr. Mellon were circulated. Mr. Mellon has replied to every such rumor that he had no intention of resigning. He has decided to fight it out.

As soon as the Secretary of the Treasury had rejected the impudent proposal of the 164 Congressmen to run his department for him by means of politicians, and as soon as it was known that President Harding had approved of his reply, every one of these Congressmen broke for cover. Begg, who presented the petition, did not know anything about the list of men to be removed, prepared in some anonymous source which he was unable to find out. Congressman Will Wood, who went to the President about the same time, said that he had had nothing to do with presenting this petition. He was merely asking for some removals that he knew ought to be made, and he was a good civil service reformer. No one could find a copy of the petition anywhere. Even at the White House, attachés said they did not have one, and did not know the names of those who signed it. Inquiries were made of Republican Senators and Representatives, but not one of them knew who could have been the 164.

Nobody knew anything about it. There was never a more disorderly and universal stampede after an attack just begun. Now it is Elmer Dover and not Secretary Mellon who is to leave the service of the Government.

Attorney General Daugherty's attitude toward the merit system was clearly expressed in the following testimony before the House Appropriations Committee:

"I do not speak for the Administration, but I am giving you the benefit of my observation and judgment, about which I have no doubt, and I am thoroughly convinced that the civil service is a hindrance to the Government. I would rather take the recommendation of a political committee, either Democratic or Republican, a self-respecting committee, for the appointment of a man or woman than be compelled to go through the requirements of the civil service to secure an employe."

It is true, as sometimes said in criticism of the Civil Service law, that it prevents personal selection of subordinates by those responsible for the operation of the Government, unless the person desired for the place stands among the three highest eligibles. The reason it restricts this choice is because it was found from whole generations of disastrous experience that those invested with the discretionary right of making appointments did not select the best men, nor even the men they wanted, but that they were constrained to appoint the political or personal henchmen of members of Congress or of political bosses who gave these places out as rewards. Thus a set of incompetent and corrupt men was foisted upon the Government, the work was badly and extravagantly done, and worse than all, these places went as compensation for the baser and more disreputable kinds of political work. In this way work for a particular party organization or for a particular man was dishonestly paid for out of public funds raised by taxation from the members of all political parties.

The demoralization caused by this spoils system in times past was so great that it threatened the ruin of democratic institutions. More than one-third of the working hours of members of Congress of the party in power was devoted to patronage, while vital legislation was neglected. This is the system to which we are invited to return.

There is much truth in the complaint that many employes in the classified service, feeling secure of their tenure, lack energy and industry, that sometimes they are disloyal and kindle discontent among their fellow employes, that their work is some-



times small in measure and not well done, and that the service will not compare in efficiency with that of private business organizations. This is not, however, the fault of the Civil Service law. Men who are idle and inefficient can always be dismissed under the law by the appointing power. The only limitation is that they must not be dismissed on account of their religious or political affiliations or for refusal to make political contributions or to do political work, but only for such reasons as will promote the efficiency of the service and that each man shall have notice in writing of the reasons for his dismissal and of any charges preferred against him and shall have reasonable time to answer it writing with supporting affidavits. If necessary, he can be suspended at once until a final determination of his case.

Nevertheless, it is recognized by those who have studied conditions in the Federal service that better results can be obtained if the law and practice are made to provide automatically for the removal of the inefficient. A special committee of the National Civil Service Reform League worked for six months upon the draft of a bill now pending before Congress. It seeks to establish a national employment system for Federal employes based on the merit principles that tenure of office, selection of new appointees, promotion and salaries shall depend upon efficiency and capacity for service.

The bill provides for reclassification of the service to the end that employes shall be paid on the basis of equal pay for equal work; for a system of service records which will form a basis for an adequate promotion system, so that meritorious service shall be rewarded by advancement in the service; for a removal system, so that the service may get rid of the inefficient and worthless.

Efficiency cannot be brought about by ham-stringing or destroying the existing Civil Service law. That can result only in complete demoralization of the Federal service, wiping out the measure of efficiency that now prevails, at enormous cost to the people.

#### **b. View of Assistant Postmaster General John H. Bartlett**

[Statement issued by Information Service of the Post Office Department, in *N. Y. Times*, Apr. 10, 1922.]

There are under civil service in the vicinity of 450,000 employes in the Government. Among these are numbered all types of laborers and servants from the lowest paid to some of the higher officials whose salaries are in the vicinity of \$5,000.

In the early stages of civil service, its sponsors and founders, such men as ex-Senator Morrill of Vermont advocated the creation of this system as applicable only to the lower-paid employes, and they cited \$1,800 as the maximum salary to be included in civil service. The tendency of the aggressive advocates of civil service has been to reach constantly higher and higher officials, and this development of civil service has been going on steadily until now when, as above stated, it reaches those who are paid as high as \$5,000.

It has thus at last reached into the realm of what may be called "administrative officers." This process of reaching to include the higher paid has been going on at the expense of perfecting civil service within its admittedly proper sphere as affecting the great body of Federal workers.

It is exceedingly difficult to draw the line where civil service should stop its attempt to reach the higher officials, but it would seem to be reasonably sound doctrine that, in a government by the people, when a new administration comes in, with a fresh mandate from the people to carry out certain policies, it should have the privilege, in fact a perfectly free hand, to select all those higher officials to whom must be entrusted administrative policies and executive discretion. If it cannot have this power, the will of the people will be defeated.

It goes without saying that an administration desirous of accomplishing great reforms and of carrying out great policies must surround itself with administrative and executive officials who are enthusiasts for those reforms and policies. It must surround itself with men and women whom it can absolutely trust, and when I say trust, I mean trust with its secrets as well as its funds, for it is well known that the opposition to any administration in power is constantly alert to make the administration a failure. Federal employes who are constant tale-bearers to the minority party are a menace to the success of an administration.

It can readily be proved by repeated decisions and acts of the Civil Service Commission that it has been the policy to strengthen and uphold civil service and particularly within its admittedly proper scope, better than has ever been done before. The commission has planned to improve the type of examinations and has made certain improvements in this line. It has planned to make character investigations, has taken the matter up with the President and received his cordial endorsement and has secured an appropriation of \$40,000 with which to do this work.

It has established under the Budget Bureau a personnel board with a view of assisting the various departments and independent establishments of the Government to co-operate in the better administration of civil service. It has found the President unusually interested in this work and prompt to back all its forward movements in order to make legal civil service within its admittedly legitimate scope better, more practical and more businesslike. The commission has examined thousands not under legal civil service.

There is no one who does not recognize the absolute necessity of a civil service law well administered. It would be impossible for the Government to do business without a civil service commission and a civil service law.

Any one who attempts to charge that this Administration has shown any idea of uprooting the civil service is charging what he can easily know to be absolutely unfounded. Some one in his disgust at times may say he is opposed to the whole system. He does not mean it. What he does mean is that some of the eager friends of civil service have been so grasping for high administrative positions to be put under civil service that in his haste he makes this sweeping assertion.

Civil service is being well administered at the present time, so far as the commission and its subordinates are concerned. It is perfectly easy to get rid of persons under civil service who become incompetent, insubordinate or dishonest or unnecessary. No one knows better than the present commissioners that improvements can be made in the future, as they have been in the past.

One general thought, that the present idea that civil service progresses in proportion as it reaches up to take in higher-paid officials, is wrong. That should not be the test. A better test is that it progresses in proportion to the progress it makes in perfecting a just system of handling the lower-paid routine servants of the Government, whom it was clearly intended to protect.

The great body of civil service workers of the country should not change from administration to administration. Efficiency of Government, as well as justice to the employes, demands this; but executive and administrative officials, whom the President must rely upon to carry out his administrative policies, must change from administration to administration, in order to carry into full force and effect the expressed will of the people in a popular government.

## CHAPTER IX

### CONGRESS: SELECTION AND STRUCTURE

#### 55. LAME DUCK SESSIONS

Congress meets in annual session on the first Monday in December, a date fixed by the Constitution. Two serious evils have resulted from this. In the first place, it means that members do not ordinarily take their seats until after an interval of thirteen months after their election. Secondly, it means that the second, or short session of any Congress, meets after the November elections, in which a number of members may have been defeated for reelection. Such "lame ducks," as these defeated members are called, have, therefore, an opportunity to legislate or to hold up legislation, in spite of their repudiation at the polls. The obvious remedy for these evils is to fix another date for the assembling of Congress, which in view of the constitutional provision, could be done by statute at any time.<sup>1</sup> However, the proposals to change the date for this purpose have usually been linked with proposals also to change the inauguration date, and hence have been submitted in the form of constitutional amendments. A resolution for such amendment has been adopted in the Senate four times (in 1923, 1924, 1926, and 1927), each time with very little opposition. It failed to come to a vote in the House until March, 1928, when it secured a majority (209-157), but not the necessary two-thirds.

##### a. Norris Proposal

[*Congressional Record*, vol. 67, pt. 4, p. 3968.]

Joint Resolution Proposing an amendment to the Constitution of the United States fixing the commencement of the terms of President and Vice President and Members of Congress, and fixing the time of the assembling of Congress.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following amendment of the Constitution be, and hereby, is, proposed to the States, to become valid as a part of said Constitution when ratified by the legislatures of the several States as provided by the Constitution:*

<sup>1</sup> A bill to fix the meeting of Congress on the first Monday in November and its adjournment on the second Monday in May was passed by both houses in 1836, but was vetoed by President Jackson. See *Congressional Debates*, vol. 12, pp. 1649-1757-1758, 1880, 4139.

## "ARTICLE—

"SECTION 1. The terms of the President and Vice President in office at the time this amendment takes effect shall end at noon on the third Monday in January and the terms of Senators and Representatives then in office at noon on the first Monday in January, of the year in which such terms would have ended if this article had not been ratified, and the terms of their successors shall then begin.

"SEC. 2. The Congress shall assemble at least once in every year and such meeting shall be on the first Monday in January unless they shall by law appoint a different day.

"SEC. 3. If the House of Representatives has not chosen a President, whenever the right of choice devolves upon them, before the time fixed for the beginning of his term, then the Vice President chosen for the same term shall act as President until the House of Representatives chooses a President; and the Congress shall by law provide that in the event the Vice President has not been chosen before the time fixed for the beginning of his term, what officer shall then act as President, and such officer shall act accordingly until the House of Representatives chooses a President, or until the Senate chooses a Vice President.

"SEC. 4. This amendment shall take effect on the fifteenth day of October after its ratification."

**b. Report of Senate Judiciary Committee, 1924**

[Senate Report No. 170, 68 Cong., 1 Sess., in *Congressional Record*, vol. 65, pt. 4, pp. 4149-4150.]

. . . . .

The resolution proposes to amend the Constitution of the United States by fixing the beginning of the terms of President and Vice President at noon on the third Monday in January and the terms of Senators and Representatives at noon on the first Monday in January following their election in the preceding November. Under existing conditions a new Congress does not actually convene in regular session until a year and one month after its Members have been elected. When our Constitution was adopted there was some reason for such a long intervention of time between the election and the actual commencement of work by the new Congress. We had neither railroads nor telegraphic communication connecting the various States and communities of the country. Under present conditions, however, the

result of elections is known all over the country within a few hours after the polls close, and the Capital City is within a few days' travel of the remotest portions of the country.

Originally, Senators were elected by the legislatures, and as a rule the legislatures of the various States did not convene until after the beginning of the new year, and it was difficult and sometimes impossible for Senators to be elected until February or March. Since the adoption of the seventeenth amendment to the Constitution, however, Senators have been elected by the people at the same election at which Members of the House are elected. There is no reason, therefore, why the Congress elected in November should not be sworn in and actually enter upon the duties of office at least as soon as the beginning of the new year following their election.

The only direct opportunity that the citizens of the country have to express their ideas and their wishes in regard to national legislation is the expression of their will through the election of their representatives at the general election in November. During the campaign that precedes this election the great questions demanding attention at the hands of the new Congress are discussed at length before the people and throughout the country, and it is only fair to presume that the Members of Congress chosen at that election fairly represent the ideas of a majority of the people of the country as to what legislation is desirable. In a Government "by the people" the wishes of a majority should be crystallized into legislation as soon as possible after these wishes have been made known. These mandates should be obeyed within a reasonable time.

Under existing conditions, however, more than a year elapses before the will of the people expressed at the election can be put into statutory law. This condition of affairs is not only unfair to the citizenship at large, who have expressed their will as to what legislation they desire, but it is likewise unfair to their servants whom they have elected to carry out this will. It is true that it is within the power of the President to call an extraordinary session of Congress at an earlier date than the one provided by law, but the new Congress can not be called into extraordinary session until after the 4th of March, which would not give the new Congress very much time for the consideration of important national questions before the summer heat in the Capital City makes even existence difficult and good work almost impossible. It is conceded by all that the best time for legislatures to do good work is during the winter months. Practically all the

States of the Union recognize this fact and provide for the meeting of their legislatures near the 1st of January. Moreover, the wishes of the country having been expressed at an election should not be dependent for their carrying out upon the will of the President alone. Provision should be made by law so that the new Congress could begin the performance of its important duties as soon after election as possible and under conditions that are most favorable for good work. Under existing conditions a Member of the House of Representatives does not get started in his work until the time has arrived for renominations in his district. He has accomplished nothing and has not had an opportunity to accomplish anything because Congress has not been in session. He has made no record upon which to go before his people for election. It is unfair both to him and to the people of his district. In case of a contest over a seat in the House of Representatives, history has shown that the term of office has practically expired before the House is able to settle the question as to who is entitled to the contested seat. During all this time the occupant of the seat has been drawing the salary and if it is decided in the end that the occupant was wrongfully seated, then the entire salary must again be paid to the person who has been unjustly deprived of his seat. Double pay is therefore drawn from the Treasury of the United States and the people of the district have not been represented by the Member whom they selected for that purpose. No reason has been given why a new Congress elected at a general election to translate into law the wishes of the people should not be installed into office practically as soon as the results of the election can be determined.

Another effect of the amendment would be to abolish the so-called "short session of Congress." If the terms of Members of Congress begin and end in January instead of on the 4th of March as heretofore, and Congress convenes in January, there would be no such thing as a short session of Congress. Every other year, under our Constitution, the terms of Members of the House and one-third of the Members of the Senate expire on the 4th day of March. The session begins on the first Monday in December and because of the expiration of such terms, it necessarily follows that the session must end not later than the 4th of March. Experience has shown that this brings about a very undesirable legislative condition. It is a physical impossibility during such a short session for Congress to give attention to much general legislation, for the reason that it requires practically

all of the time to dispose of the regular appropriation bills. The result is a congested calendar both in the House and the Senate. It is known in advance that Congress can give attention to but a very small portion of the bills reported from the committees. The result is a congested condition that brings about either no legislation or illy considered legislation. In the closing days of such a session bad laws get through and good laws are defeated on account of this condition and the want of time to give proper consideration to anything, and the result is dissatisfaction not only on the part of Members of Congress, but on the part of the people generally. Jokers sometimes get on the statutes because Members do not have an opportunity for the want of time to give them proper consideration. Mistakes of a serious nature creep into all kinds of statutes which often nullify the real intent of the lawmakers, and the result is disappointment throughout the country. Such a congested condition in the National Legislature can not bring about good results. However diligent and industrious Members of Congress may be, it is a physical impossibility for them to do good work. Moreover, it enables a few Members of Congress to arbitrarily prevent the passage of laws simply by the consumption of time. In every way it brings about an undesirable legislative condition, and it is not surprising that results are so often disappointing.

There is another very important reason why this change should be made. Under the Constitution as it now stands, if it should happen that in the general election in November in presidential years no candidate for President had received a majority of all the electoral votes, the election of a President would then be thrown into the House of Representatives and the membership of that House of Representatives called upon to elect a President would be the old Congress and not the new one just elected by the people. It might easily happen that the Members of the House of Representatives, upon whom involved the solemn duty of electing a Chief Magistrate for four years, had themselves been repudiated at the election that had just occurred, and the country would be confronted with the fact that a repudiated House, defeated by the people themselves at the general election, would still have the power to elect a President who would be in control of the country for the next four years. It is quite apparent that such a power ought not to exist, and that the people having expressed themselves at the ballot box should, through the Representatives then selected, be able to select the President for the ensuing term. If the amendment we have proposed is



adopted and becomes a part of the Constitution, such a condition could not happen, and in such a case the new House of Representatives fresh from the people would be the one upon which would devolve the power to select the new President.

Section 3 of the proposed amendment gives Congress the power to provide by law who shall act as President in a case where the election of a President has been thrown into the House of Representatives and the House has failed to elect a President and the Senate has likewise failed to elect a Vice President. The importance of this can be understood when we realize that under the present Constitution if the election of President and Vice President should be thrown into Congress on account of a failure of the Electoral College to elect, and that the House should fail within the time specified in the Constitution to elect a President, and the Senate should likewise fail during such time to elect a Vice President, the country would be left entirely without a Chief Magistrate and without any means of selecting one. This condition has, it is true, never happened in the history of the country, and while it may never happen, it does seem very important that some constitutional provision be enacted by which this most dangerous emergency may be avoided. The present Constitution gives power to Congress to provide who shall act as President when there is a vacancy both in the President's office and the Vice President's office caused by death, removal, or resignation, but there is no provision in the present Constitution that gives to Congress or any other authority the power to select an acting President in cases where the election has been thrown into the House of Representatives and where the House of Representatives has failed to elect a President, and the Senate has failed likewise to elect a Vice President. If such a contingency should occur, and it is liable to occur after any presidential election, the country would find itself in a condition where it would be impossible for a Chief Magistrate to be selected. The committee has corrected this defect by giving to Congress in section 3 of the proposed amendment the authority to select the acting President in such an emergency.

The question is sometimes asked, why is an amendment to the Constitution necessary to bring about this desirable change? The Constitution does not provide the date when the terms of Senators and Representatives shall begin. It does fix the term of Senators at six years and of Members of the House of Representatives at two years. The commencement of the term of the first President and Vice President and of Senators and Represen-

tatives composing the first Congress was fixed by an act of Congress adopted September 13, 1788, and that act provided "that the first Wednesday in March next be the time for commencing proceedings under the Constitution." It happened that the first Wednesday in March was the 4th day of March, and hence the terms of the President and Vice President and Members of Congress begin on the 4th day of March. Since the Constitution provides that the terms of Senators shall be six years and the term of Members of the House of Representatives two years, it follows that this change can not be made without changing the terms of office of Senators and Representatives, which would in effect be a change of the Constitution. By another act (the act of March 1, 1792), Congress provided that the terms of President and Vice President should commence on the 4th day of March after their election. It seems clear, therefore, that an amendment to the Constitution is necessary to give relief from existing conditions.

## 56. SEATING OF MEMBERS

The Constitution makes each house "the judge of the qualifications, elections, and returns of its own members", which gives each house the power (1) to settle contests, (2) to refuse to seat, (3) to declare a seat vacant. A number of cases have arisen, affecting both houses, in which the house concerned has been compelled to decide to what extent this power should be exercised. On the one hand it is asserted that all that the houses may do is to determine whether the person seeking a seat has been actually elected and has the constitutional qualifications; on the other hand, it is claimed that the houses have the right to exclude persons who may for moral or ethical reasons or reasons of sound public policy be considered as unfit for membership. Among the recent cases of most importance are those of Victor Berger (Socialist; Wis.), elected to the House in 1918, although at the time under conviction for opposing the war and violating the Espionage Act (a conviction later reversed by the Supreme Court); of Truman H. Newberry (Republican; Mich.), elected to the Senate in 1918, after the expenditure in the campaign of sums greatly in excess of that allowed by either the Michigan or federal statutes; and of Frank L. Smith (Republican; Ill.), elected to the Senate in 1926 (and after the election appointed to fill a vacancy), after revelations of large contributions to his campaign by the utility interests, Smith at the time being also the Chairman of the Illinois Commerce Commission, a body having as its primary function the regulation of these same interests.

Berger was refused his seat on November 10, 1919, by a vote of 311-1. He was overwhelmingly reelected at the special election that followed, but was again (January 10, 1920) denied his seat by a vote of 330-6. Being elected again at the regular election of 1922, and his conviction having in the meantime been reversed by the Supreme Court, he was seated by the House. Newberry was given the oath of office when the Senate to which he was elected first convened, and later (January 12, 1922) was formally

declared entitled to his seat by a close vote (46-41), although at the same time the Senate severely condemned the practices and expenditures in connection with his election. "Newberryism" became a leading issue in the campaign of that same year, and most of the Senators up for reelection who had voted to seat him having been defeated, Senator Newberry resigned shortly after the election. The most notorious of these recent cases, however, is that of Frank L. Smith. Senator McKinley, whom Smith had beaten for the Republican nomination, and whose term was about to expire, died shortly after the November election, whereupon the governor of Illinois appointed Smith to fill the vacancy. The Senate refused by a vote of 48-33 to give Smith the oath pending an investigation of his right to a seat under such appointment, and the matter was pressed no further. With the opening of the new Congress in December, 1927, Smith again presented his credentials, now by virtue of his election in 1926. He was again refused the oath, and finally, on January 19, 1928, was formally denied his seat by a vote of 61-23. Mr. Smith and Governor Small both at first refused to recognize the existence of a vacancy, but later Smith "resigned" and was promptly reappointed by the governor. He made no attempt, however, to secure his seat under this appointment, but instead ran for renomination in an attempt to secure a "vindication," and was defeated by a large majority.

#### a. Joint Resolution of Illinois Legislature

[*Laws of Illinois, 1927*, pp. 884-886.]

(House Joint Resolution No. 45)

*Resolved, by the House of Representatives of the State of Illinois, the Senate concurring herein:*

*Whereas, The Seventeenth Amendment of the Constitution of the United States makes mandatory that "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years;" and by reason of this constitutional provision the State of Illinois is entitled to, and guaranteed two Senators in the Senate of the United States; and*

*Whereas, On or about the seventh day of December, A. D. 1926, the Hon. William B. McKinley, one of the United States Senators representing the State of Illinois in the United States Senate, departed this life, and thereupon by reason of this vacancy, the Hon. Frank L. Smith, was in accordance with the Constitution and statutes, appointed to fill the unexpired term of said William B. McKinley as United States Senator from Illinois, and the said Hon. Frank L. Smith presented the credentials in proper form under the great seal of the State of Illinois, to the United States Senate, and the United States Senate without questioning the legal form and force of said credentials, nor question-*

ing the constitutional qualifications of the said Hon. Frank L. Smith, nor the guaranteed right under the Constitution of the United States for full representation to membership in United States Senate by the State of Illinois, refused to administer the oath of office to the said Hon. Frank L. Smith, and by that act, denied to the State of Illinois, equal representation in the said Senate of the United States; and

*Whereas*, For a period of nearly one hundred forty years, since the adoption of the Constitution of the United States and the amendment recited above, the rights of a sovereign state to equal representation in the Senate of the United States, wherein the credentials and constitutional qualifications were unquestioned, has never before been denied by the Senate of the United States refusing to administer the constitutional oath of office; and

*Whereas*, This same question on an objection to the right of a Senator-elect to take the prescribed constitutional oath of office was once before raised against the State of Illinois, but upon the able representation of the constitutional rights of the State of Illinois by Hon. Stephen A. Douglas, Senior Senator from Illinois, in the matter of the credentials of General James Shields, a Senator-elect from Illinois, the United States Senate finally declared that the guaranteed constitutional rights of a sovereign state should not be abridged by a denial of the right of a Senator-elect to take the oath, and by this action, established an historic precedent; and

*Whereas*, One of the early proposed amendments to the Constitution making it possible for United States Senators to be elected by a direct vote of the people was advocated by Senator John M. Palmer of Illinois, and subsequently became a part of the fundamental law of the land; and

*Whereas*, The said Hon. Frank L. Smith has been by majority of the people of the State of Illinois, after a full presentation, discussion and consideration of all issues involved, elected as a Senator of the United States from the State of Illinois, and no contest has issued against said election, and credentials have been accepted by the United States Senate as being in due form, and the qualifications of the said United States Senator-elect are in full compliance with all constitutional and statute requirements; and [here follow citations of the pertinent constitutional provisions—Art. I, sec. 3, cl. 3; 17th Amendment; Art. V; Art I, sec. 5, cl. 1-2; 10th Amendment].

*Whereas*, The foregoing are all of the relevant provisions in

the Constitution with respect to the power of the Senate over the selection of Senators; and

*Whereas*, The credentials of the said Hon. Frank L. Smith hereinbefore recited, constitute a mandate of the choice of a majority of the people of the State of Illinois, at a general election and which selection and choice by a majority of the people of the State of Illinois is uncontested, and that said election is for a period of six years, and that the continued refusal of the Senate of the United States to administer the oath of office to the said Hon. Frank L. Smith as United States Senator from Illinois, will result in depriving the State of Illinois of the full representation in the Senate of the United States for a period of six years, to which it is by the Constitution of the United States entitled and guaranteed; therefore, be it

*Resolved*, by the People of the State of Illinois, represented in the General Assembly, That in view of the foregoing, it be respectfully presented to the Senate of the United States of the Seventieth Congress, that the people of the State of Illinois are clearly within their rights in the expectation that the credentials of the Hon. Frank L. Smith now on file in the Senate of the United States, entitle the said Hon. Frank L. Smith to take the oath of office to which he has been elected as a United States Senator from the State of Illinois; and, be it further

*Resolved*, That a copy of this resolution be directed to the Vice President of the United States, the constitutional presiding officer of the United States Senate, and a copy of this resolution be transmitted to the Hon. Charles S. Deneen, Senior United States Senator from Illinois, with the request and direction that these resolutions be presented to the Senate of the United States, to the end that the sovereign State of Illinois shall not be deprived of the rights of full representation in the Senate of the United States, as guaranteed by the Constitution of the United States; and, be it further

*Resolved*, That a delegation on the constitutional rights of the State of Illinois be, and the same is hereby created, the said delegation to consist of the Speaker of the House of Representatives, the President of the Senate, and two members of the House of Representatives to be appointed by the Speaker thereof, and two members of the Senate, to be appointed by the President of the Senate on the nomination of the Executive Committee, and it shall be the duty of said delegation on the constitutional rights of the State of Illinois to appear before the Senate of the United States, or any of its committees or sub-committees, upon the con-

vening of said Senate and at any time thereafter, and to present to said Senate and its committees a consideration of the constitutional rights of this State, and on behalf of the people of this State respectfully to insist upon a recognition by the Senate of the United States of the constitutional right of this State to be represented in the Senate of the United States by two Senators, and that said constitutional right be recognized by the administration of the oath to the Hon. Frank L. Smith as United States Senator from this State.

Adopted by the House, June 16, 1927.

Concurred in by the Senate, June 21, 1927.

### b. Senate Resolution

[Adopted Jan. 19, 1928, by vote of 61-23. *Congressional Record*, vol. 69, pt. 2, p. 1718.]

Whereas, on the 17th day of May, 1926, the Senate passed a resolution creating a special committee to investigate and determine the improper use of money to promote the nomination or election of persons to the United States Senate and the employment of certain other corrupt and unlawful means to secure such nomination or election;

Whereas, said committee in the discharge of its duties notified Frank L. Smith, of Illinois, then a candidate for the United States Senate from that State, of its proceedings and the said Frank L. Smith appeared in person and was permitted to counsel with and be represented by his attorneys and agents;

Whereas, the said committee has reported:

That the evidence, without substantial dispute, shows that there was expended, directly or indirectly, for and on behalf of the candidacy of the said Frank L. Smith, for the United States Senate, the sum of \$458,782; that all of the above sum except \$171,500 was contributed directly to and received by the personal agent and representative of the said Frank L. Smith with his full knowledge and consent;

That of the total sum aforesaid there was contributed by officers of large public service institutions doing business in the state of Illinois or by said institutions the sum of \$203,000, a substantial part of which sum was contributed by men who were non-residents of Illinois, but who were officers of Illinois public service corporations;

That at all of the times aforesaid the said Frank L. Smith was chairman of the Illinois Commerce Commission, and that said

public service corporations, commonly and generally, had business before said commission, and said commission was, among other things, empowered to regulate the rates, charges, and business of said corporations;

That by the statutes of Illinois it is made a misdemeanor for any officer or agent of such public service corporations to contribute any money to any member of said commission or for any member of said commission to accept such moneys upon penalty of removal from office;

That said Smith has in no manner controverted the truth of the foregoing facts, although full and complete opportunity was given to him, not only to present evidence, but arguments in his behalf; and

Whereas, the said official report of said committee and the sworn evidence is now and for many months has been on file with the Senate, and all of the said facts appear without substantial dispute; Now, therefore, be it

*Resolved*, That the acceptance and expenditure of the various sums of money aforesaid in behalf of the candidacy of the said Frank L. Smith is contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuity of free government, and taints with fraud and corruption the credentials for a seat in the Senate presented by the said Frank L. Smith; and be it further

*Resolved*, That the said Frank L. Smith is not entitled to membership in the Senate of the United States, and that a vacancy exists in the representation of the State of Illinois in the United States Senate.

### c. Statement of Governor Small

[*Chicago Tribune*, Jan. 21, 1928.]

The attempt of the United States senate to declare a vacancy in the constitutional representation of Illinois in the United States senate is, in my judgment, wholly unwarranted, and constitutes a dangerous attempt to nullify the rights of a sovereign state and the people thereof.

By the death of the late Hon. William B. McKinley, a vacancy was created in the representation of Illinois in the senate of the United States, in the 69th congress. The governor of Illinois, clearly within his constitutional rights and duty, appointed Hon. Frank L. Smith, on the sixteenth day of December, 1926, to fill that vacancy.

The manner of appointment and credentials predicated thereon were in due legal form, and the senator-designate possessed all constitutional qualifications.

For the first time in the history of our government, where such credentials and qualifications were unquestioned, the bearer thereof was denied the right to take the oath of office. Though the senate well knew that those credentials of appointment were not predicated upon a primary or an election, but on a lawful exercise of the appointing power, yet the United States senate denied the constitutional right of Illinois to equal, full and continuous representation during the remainder of the 69th congress. Thereafter Hon. Frank L. Smith, then and now a citizen of highest standing and reputation and enjoying the confidence of the people of our state, was nominated in the Republican primary, and subsequently elected United States senator at the general election in November, 1926, by the voters of Illinois, and neither the primary or election having been contested, holds the credentials for a full term of six years, beginning with the 70th congress. Such credentials were passed upon by the regular committee on Privileges and Elections of the United States senate, and reported to be in legal form, and by this action Hon. Frank L. Smith was accorded the right and privileges of a United States senator.

Senator-elect Frank L. Smith then again presented himself as the duly elected senator from Illinois at the bar of the senate to take the required constitutional oath of office, at the commencement of the seventieth congress, on Dec. 5, 1927. When the senate by the adoption of a resolution, prevented the senator-elect of Illinois from taking the oath and when yesterday it purported to declare a vacancy in the representation of Illinois in the senate of the United States, the senate completed its effort to nullify the guaranteed rights of a sovereign state, and offered an affront to the people of Illinois.

As governor of Illinois, and in behalf of our people, I desire to express an unqualified resentment of this unwarranted assumption of authority by the United States senate in infringing on the rights of a free people to select a senator of their own choice.

The governor of Illinois holds that the rights of the several sovereign states which formed the federal union and adopted the constitution of the United States, are the very foundation of our national existence and destiny, and no right is more essential than the right of the states, as such, to express their views by two senators of their own selection.



The credentials of Frank L. Smith as United States senator from Illinois were bestowed on him by the people, who have entrusted him with the great responsibility of vindicating and protecting their equal rights as people of a free country.

I have read with deep interest and heartily approve of his courageous and patriotic statement before the senate committee, in which he refused to trade off the rights of Illinois. The splendid response and commendation from the people of Illinois of the position taken by him in their behalf and in protecting sovereign rights of his state has been so general throughout the state that even the barriers of partisanship have been swept away. This universal expression of sentiment lends strength to my plain duty in this expression of the attitude of the state of Illinois.

## 57. MEMBERS OF CONGRESS AND PUBLIC OFFICE

Although the Constitution forbids members of Congress from holding at the same time any other office under the United States, that provision has been interpreted so as to permit the naming of Senators and Representatives to various types of offices, such as treaty commissions and the like. However, there has always been considerable opposition to the practice, and when President Harding, in 1922, appointed Senator Smoot and Representative Burton as members of the World War Foreign Debt Commission created by Congress to fund the war debts, there was vigorous debate in the Senate and a hostile committee report, on the ground that these members of Congress were constitutionally ineligible. The appointments were finally confirmed (on April 11, 1922) by a vote of 47-25.

### a. Opinion of Attorney General Daugherty

[*Congressional Record*, vol. 62, pp. 5268-5269.]

Department of Justice,  
Office of the Attorney General,  
Washington, D. C., March 8, 1922.

My Dear Mr. President: I have the honor to acknowledge your request for my opinion as to whether the appointment of Senator Smoot and Representative Burton to the World War Foreign Debt Commission is invalid under Article I, section 6, of the Constitution.

Were this a case of first impression, I should have serious doubt as to what reply I should make. The language of the Constitution is so broad and comprehensive that it can not be denied that the commissioners in question, in a general sense, hold a "civil office under the authority of the United States," and as this commission was created by the Congress at a time when the

two commissioners were Members of that body, the application of the section of the Constitution does present a serious and debatable question.

This department has already expressed an opinion on the subject, for, in an opinion rendered by my predecessor, Attorney General Griggs (Op. Atty. Gen., vol. 22, p. 183), specific reference is made to the fact that Senator Morgan was, with the approval of the Executive, appointed a member of the fur seal arbitration, although, while a Senator, he aided in creating that "civil office".

I have failed to find any judicial interpretation of the section of the Constitution now under consideration, and, in the absence of such finally authoritative interpretation, great weight must be attached to the practical construction put upon the Constitution from the beginning of the Government. In such practical construction a distinction has always been made between special employment on the one hand and offices on the other, and between offices—using that term in a general sense—which serve only a temporary purpose, and those which have duration and permanency. From the very beginning of the Government Members of the Senate and the House have, from time to time, been asked to render services for the Government upon commissions of various kinds, and it has never been decided that such temporary employment for a special purpose and to serve an immediate exigency constituted a "civil office" within the meaning of the constitutional provision above referred to.

The Supreme Court has held in a number of cases (*United States v. Hartwell*, 6 Wall, 385; *United States v. Germaine*, 99 U. S. 508; *Auffmordt v. Hedden*, 137 U. S. 310) that the word "office" "expresses the idea of tenure, duration, emolument, and duties." Its duties must be "continuing and permanent, not occasional and temporary." In the last-cited case the office then under consideration had no general functions, nor any employment which had any duration as to time, or which extended over any case further than the power to act on that particular case. It was held by the Supreme Court "that the incumbent did not hold an 'office' within the meaning of Article II, section 2, of the Constitution."

Where, therefore, a position does not have continuancy and permanency and its function is restricted to a single matter, the position seems to be that of an executive agent and not an "office" within the meaning of the Constitution.

Many cases could be cited in other jurisdictions and the views

of text writers could also be readily adduced to justify the theory that the idea of an office "clearly embraces the idea of tenure, duration, fees, or emoluments, rights, and powers, as well as that of duty."

Applying this distinction between an "office" and a temporary trust to the act of Congress which created the World War Foreign Debt Commission, I would say that for several reasons it excludes the application of the word "office" as above defined.

The commissioners receive no compensation.

Their tenure of office is limited in time and is restricted to a single object.

The subject matter of their duties is work in which the Congress has a peculiar interest and as to which it is finally responsible; for if the adjustment of the debts due to the United States by foreign nations shall ultimately be accomplished by treaty, the latter must receive the sanction of the Senate, and therefore there is propriety in a Member of that body participating in the negotiations. So far as the adjustment of the debt does not depend upon treaty obligations, the question as to what adjustment will be made of it is for Congress to determine, and it has seen fit to delegate the difficult task of adjustment to the commission, with the approval of the President. This increases the propriety of having a Member of the Senate and of the House participate in such adjustment.

Moreover, the commissioners can take no action except with the approval of the President. Their duties, therefore, are primarily those of negotiators for the terms of such adjustment, and secondarily, as an advisory body to the President of the United States.

Inasmuch as both the legislative and the executive branches of the Government have responsibility in the adjustment of these obligations, it was desirable that there should be coordination between the two branches of the Government, and presumably this consideration prompted the appointment of a Member of the Senate and a Member of the House to confer with the Secretary of State, the Secretary of the Treasury, and the Secretary of Commerce in reaching some wise conclusion which these representatives of the executive and legislative branches of the Government could recommend to the President, to whom the final decision was delegated by Congress.

In substance and effect, your appointment to the debt commission simply puts into operation that which, without the legislation, might have occurred with entire propriety, viz., a con-

ference between the representatives of Congress charged with the final responsibility of adjusting the debt and Cabinet officers who are charged with the duty of carrying out the wishes of Congress. No one would have questioned the propriety of representatives of the appropriate committee of Congress conferring with the Secretary of the Treasury and the Secretary of State, with a view to some recommendation to be made to the President which would guide him in his duty of negotiating with foreign countries for the adjustment of their financial obligations to this country.

Having in mind the debates in the Constitutional Convention, it seems clear that the purpose of Article I, section 6, was to prevent Members of Congress from creating offices which thereupon they would seek to fill by resigning their positions in Congress. Thus the fundamental idea was the incompatibility of the new offices thus created with their existing office as Members of Congress. This reason is plainly inapplicable to the present legislation, for, when Senator Smoot and Representative Burton act on this debt commission, they are not exercising duties which are incompatible with their duties as Members of Congress, but, on the contrary, their duties as commissioners are, in a sense, an auxiliary to their work as Congressmen, and moreover an auxiliary to all the Members of Congress in any further consideration that that body may feel obliged to give to this matter of adjusting these foreign obligations.

Here, again, it seems unreasonable to interpret the provision of the Constitution in question in a way that would forbid the cooperation between the legislative branch of the Government and the executive, which, with the growing complexity of life, is becoming increasingly necessary.

I can not think that such a statesmanlike solution of the question is within the mischief against which the constitutional provision above referred to was made. That provision (Art. I, sec. 6) evidently intended, on the one hand, that Congress should not create offices which its Members should fill, and that it should not be within the power of the President, on the other hand, to appoint to office Members of Congress when the offices have been created during their membership. This was a wise and salutary provision; but it seems to me to strain the language to apply it to a mere temporary employment, without compensation, and purely of an advisory capacity and intended to serve a temporary emergency.

To take an extreme illustration, it could hardly be said that if

Congress creates a joint commission, to be composed of executive officers and Members of Congress, to take charge of the inauguration of a President, that such temporary and honorable employment offends the inhibition of the Constitution. There must be, in the nature of the case, as our governmental machinery becomes more complex, frequent measures to insure closer cooperation and a better coordination between the Executive and the legislature. It has long since been found impracticable to apply the Montesquieu doctrine as to the separation of the Government into three distinct and independent departments in all its literal force. Coordination must be secured if the machinery of the Constitution is to function, and to do so it must be possible, where temporary emergencies require it, to enable members of the executive and legislative departments of the Government to cooperate for special purposes on special commissions, and to construe the constitutional inhibition as obstructing and preventing such reasonable coordination tends to make the section of the Constitution in question impracticable of enforcement.

An impracticable and unreasonable construction of any clause of the Constitution ought to be avoided, and, as no judicial authority can be cited which forbids the views herein expressed, and as the practical construction by the Government from its very beginning and long acquiesced in has given some sanction to the views above expressed, I have less hesitation in advising you that in my judgment the appointment of Senator Smoot and Representative Burton does not offend Article I, section 6, of the Constitution.

H. M. DAUGHERTY,  
*Attorney General.*

The President,  
*The White House, Washington, D. C.*

#### b. Report of Judiciary Committee

Senate Report No. 563, 67 Cong., 2 Sess.; in *Congressional Record*, vol. 62, pp. 5257-5260.]

MR. WALSH of Montana, from the Committee on the Judiciary, submitted the following report to accompany Senate Resolution 244:

The Committee on the Judiciary, to which was submitted by Senate Resolution 244 the question of the eligibility of Hon. Reed Smoot and Hon. Theodore E. Burton to membership on the commission created under the act of Congress approved Feb-

ruary 9, 1922, in view of the fact that at the time of the passage of the act the former was, as he still is, a Member of the Senate and the latter was, and he still is, a Member of the House of Representatives, respectfully reports that, having referred the question so submitted to a subcommittee, consisting of Senators Cummins, Brandegee, Sterling, Overman, and Walsh, it reported that, having investigated the question, the conclusion was reached that the gentlemen named are ineligible, Senators Cummins and Sterling dissenting; that upon the incoming of the said report your committee canvassed the question and now reports that it is its opinion the gentlemen mentioned are not, nor is either of them, eligible to membership on the said commission for which they have been nominated by the President of the United States.

In its labors the committee had the assistance of a discussion of the question presented by Senator Walsh, copy of which is hereto appended, supporting the view that the gentlemen named are not eligible, and in support of the contrary view discussion by Senators Cummins and Nelson and an opinion by the Attorney General which, it is understood, will be made a part of a report to be submitted by the minority of the committee.

In the opinion of the Attorney General reference is made to an earlier opinion of his department, copy of which, with some comments thereon by Senator Walsh, is attached hereto.

T. J. Walsh.

Wm. E. Borah.

Frank B. Brandegee.

C. A. Culberson.

G. W. Norris.

Jas. A. Reed.

Lee S. Overman.

Jno. K. Shields.

Henry F. Ashurst.

. . . . .

In what has been said in a casual way on the subject since the discussion was precipitated in connection with the legislation for funding the foreign debt, reference has been made to the frequency with which Members of Congress have been appointed as commissioners to draft treaties, a practice which, though denounced from time to time by able statesmen, dates from the early days of the Republic and was recently followed by President Harding in naming Senators Lodge and Underwood on the American delegation to the Washington Conference on Disarmament. But no justification can be found in these precedents for the appointment under consideration. The positions so filled were not created by any law of Congress. The Constitution reposes in the President of the United States, the power and au-

thority to negotiate treaties. He may act in person, as President Wilson did at Versailles, or he may designate some one to act for him, pursuing the course usually followed. It is not necessary that the appointment of persons so designated should be confirmed by the Senate. Out of abundance of caution, and perhaps from a considerate regard for the sensibilities of Senators, such appointments were, in our early history, with some frequency submitted to the Senate, and that course has been occasionally followed in modern times, but it can scarcely be contended longer that it is essential that it be.

Another class of cases, quite similar in character, includes appointments on commissions to settle international disputes, like boundary commissions or other arbitration commissions, the members of which are appointed pursuant not to an act of Congress but to a treaty. Such officers, if they may be so denominated, do not come under the operation of the clause of the Constitution under consideration which was intended to exclude Members of Congress only from such offices as they had as such a part in creating or in making more desirable by increasing the emoluments attached to it. The provision in question was one of the compromises of which not a few are found in the Constitution. The more skeptical wished to make Members ineligible to appointment to any office, and not only for the term of the Member but as well for a year after its expiration. Others objected to any restriction on the appointing power in that regard. It was finally agreed that the safety of the Republic would be sufficiently assured if the temptation were removed only with respect to such offices as the Members respectively participated in creating or making more inviting in the manner indicated. So, admitting that the members of commissions such as those last referred to are officers and that they act under the authority of the United States, rather than under a joint authority of our country and the other party to the treaty, the offices they hold are not of that class the makers of the Constitution had in mind when they framed the clause in question; that is, though they may be within its letter, they are not within its spirit.

A third class of commissions to which Members of Congress have frequently been appointed are, such as are authorized and empowered to investigate and report to Congress for its information, as a basis for legislation, which it may or may not subsequently enact. An act creating such a commission gave rise to an investigation by the Judiciary Committees of both Houses of the whole subject now being considered, action having been taken

in the Senate on the motion of Senator Hoar, of Massachusetts, the chairman of its Committee on the Judiciary. Under the act involved, President McKinley appointed as members of a commission to propose legislation for the government of the Hawaiian Islands, among others, Senators Cullom and Morgan and Representative Hitt. The House committee, through its chairman, Hon. David B. Henderson, once Speaker, made an elaborate report, copy of which is appended hereto, in which the eligibility of Members of Congress to appointment on such a commission was upheld. The Senate committee made no report, but the views of the committee in disapprobation of the practice of appointing Members of Congress to such positions were conveyed to the President by the distinguished lawyer who was then chairman of the committee, and the Senate declined to confirm the nominations of the gentlemen named against whom no objection was made except that they were Members of Congress. We are, accordingly, without any direct determination either by the Senate or its Committee on the Judiciary on the question here discussed.

Later, however, the general subject was again canvassed in the Senate in connection with a bill for the creation of a commission to investigate and report to Congress, which the Senate amended so that the appointment of Members of Congress to membership on it was forbidden.

Speaking to the amendment referred to, Senator Hoar detailed the proceedings had in connection with the Hawaiian bill, as herein recited, denounced the policy of appointing Members of Congress on such commissions, asserted that the well-nigh unanimous opinion of the Senate was against it, and that he and many other Senators were convinced that it was in contravention of the Constitution. A copy of his remarks on that occasion are appended hereto.

The position taken by Speaker Henderson, which, bear in mind, was not accepted by Senator Hoar, was that inasmuch as the commission considered by him could recommend only and had no power either to make a law, to execute a law, or to construe a law, it discharged neither legislative, executive, nor judicial functions; it exercised no part of the sovereign power of government; and therefore its members held no "office", were not "officers".

Congress might, it was pointed out, disregard utterly any report or recommendation such a commission might submit and either omit or refuse to do anything on the subject to which it relates, or it might, in the usual way, initiate legislation of a



wholly different character from that recommended. It might even anticipate the report of the committee and take action in the premises entirely at variance with any views entertained by the members of the commission.

The principle announced in the report of Speaker Henderson is believed by some members of the committee to lead to the conclusion that the members of the Foreign Debt Funding Commission hold no "office" within the meaning of the term as it is applied in section 6 of Article I of the Constitution. It is said, in support of that view, that the commission has no powers, because whatever arrangement it may make with any foreign Government is subject to the approval of the President; that in consequence of that provision the authority to make the composition [*sic*] is vested in the President and that the commission merely gathers information for his enlightenment, makes recommendations to him, upon which he is to make the final and binding agreement. But that contention is plainly at war with the perfectly clear language of the act. By its terms it is to the commission, not to the President, that the authority is given to conduct the negotiations and to enter into the agreements. He has what may be denominated with substantial accuracy a veto power, and a veto power only. If their work should be unsatisfactory to him he has no power, under the act, to initiate new negotiations or to conduct them. He might undoubtedly, under the authority to make treaties conferred upon him by the Constitution, undertake the task, but whatever agreements he might make so acting would not be final, as is provided in the act, but would be subject to ratification by the Senate. But in the event supposed he would be powerless, so far as the funding act is concerned. The fact that what the commission does is subject to the approval of the President can not be said to be inconsistent with the idea that they exercise a part of the sovereign power of the Government, or, in other words, hold office. . . . The places for which Senator Smoot and Representative Burton have been nominated are offices within the meaning of section 6 of Article I, and they are ineligible thereto.

[Then follow several appendices, and a minority report signed by seven members of the Committee.]

## 58. REAPPORTIONMENT

The Constitution requires Congress to make an apportionment of Representatives every ten years. Since the census of 1920, however, no new apportionment act has yet (1928) been passed, the latest one being that

of 1911. One reason for this delay is the difficulty of agreeing upon the size of the House, a problem all the more acute with the recent shifting of population from the rural to the urban centers. As either a reduction in size or retention at the present figure (435) would mean the loss of seats by some states, especially those of a rural character, the members from those states are likely to be opposed to reapportionment on that basis. On the other hand, should there be no reduction in the representation of any state, the House would be increased to what is commonly considered an unwieldy size (483 on the basis of the 1920 census). In order to avoid the constant recurrence of these problems, attempts have been made to establish a system of automatic reapportionment. Such a law was passed in 1850, but the principle was disregarded in the following act and ever since. A similar system has again been proposed, however, and has received considerable support both in and out of Congress. It should also be clear that reapportionment, to be effective and to represent fairly the different interests and sections of a state, requires state as well as congressional action.

Another recurrent question involved in reapportionment is the enforcement of the Fourteenth Amendment, with its provisions for reduction of the representation of any state that adds to the voting qualifications there prescribed. Although this amendment was obviously designed to force enfranchisement of the negro in the South and is therefore especially opposed by that section, the more recent provision by other states for literacy tests and other qualifications have complicated still further the problem of enforcing the terms of that amendment.

### a. Apportionment Act of 1911

[*U. S. Statutes*, vol. 37, pp. 13-14.]

An Act for the Apportionment of Representatives in Congress among the several States under the Thirteenth Census.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That after the third day of March, nineteen hundred and thirteen, the House of Representatives shall be composed of four hundred and thirty-three Members, to be apportioned among the several States as follows: [Here follows the actual apportionment.] . . .

SEC. 3. That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

SEC. 4. That in case of an increase in the number of Repre-

sentatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the Districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed.

SEC. 5. That candidates for Representative or Representatives to be elected at large in any State shall be nominated in the same manner as candidates for governor, unless otherwise provided by the laws of such State.

Approved, August 8, 1911.

#### b. Fenn Bill, 1927

[H. R. 17378, 69 Cong., 2 Sess. Text in *Congressional Record*, vol. 68, pt. 5, pp. 5414-5415.]

#### IN THE HOUSE OF REPRESENTATIVES

March 1, 1927

MR. FENN introduced the following bill; which was referred to the Committee on the Census and ordered to be printed

#### A BILL

For the apportionment of Representatives in Congress.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That after the 3d day of March, 1933, the House of Representatives shall be composed of four hundred and thirty-five Members, and these Members shall be apportioned among the several States in the manner directed in the next section of this Act.

SEC. 2. That, as soon after the next and each subsequent decennial census of the United States as the aggregate population of each State and of the United States shall have been ascertained and duly certified by the Director of the Census, it shall be the duty of the Secretary of Commerce, on the basis of these results, to apportion four hundred and thirty-five Representatives among the several States by the method known as the method of equal proportions, based on the principle that the

ratios of population to Representatives shall be as nearly as possible the same in all States: *Provided*, That each State shall have at least one Representative.

SEC. 3. That when the Secretary of Commerce shall have apportioned the Representatives in the manner directed in the preceding section of this Act among the several States under the fifteenth or any subsequent decennial census of the inhabitants of the United States, he shall as soon as practicable make and transmit under the seal of his office to the Clerk of the House of Representatives a certificate of the number of Representatives apportioned to each State under the then last decennial census.

SEC. 4. That the Clerk of the House of Representatives shall forthwith send to the executive of each State a certificate of the number of Representatives apportioned to such State under the then last decennial census.

SEC. 5. That in each State entitled under this Act to more than one Representative the Representatives to which said State may be entitled in the Seventy-third and each subsequent Congress shall be elected by districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of individuals and in number equal to the number of Representatives to which such State may be entitled in Congress, no one district electing more than one Representative.

SEC. 6. That in the election of Representatives to the Seventy-third or any subsequent Congress in any State which under the apportionment provided for in section 2 of this Act is given an increased number of Representatives, the additional Representative or Representatives apportioned to such State shall be elected by the State at large, and the other Representatives to which the State is entitled shall be elected by districts until the legislature of the said State shall redistrict it according to the provisions of section 5 of this Act.

SEC. 7. That in the election of Representatives to the Seventy-third or any subsequent Congress in any State, which under the apportionment provided for in section 2 of this Act is given a decreased number of Representatives, the whole number of Representatives to which such State is entitled shall be elected by the State at large until the legislature of said State shall redistrict it in accordance with the provisions of section 5 of this Act.

SEC. 8. That candidates for Representatives at large shall be nominated, unless the State concerned shall provide otherwise,

in the same manner in which candidates for governor in that State are nominated.

**c. Statement of Representative Tinkham (Mass.)**

[*N. Y. Times*, Dec. 6, 1920.]

My resolution proposes that an investigation be made of existing disfranchisement in the several States and that where disfranchisement is found as a fact, the representation of those States in the House of Representatives shall be reduced in accordance with the direction of the Constitution. The issue is purely one of law and order, Constitutional enforcement and political equality.

The great political inequality and great political injustice between the several States under the present unconstitutional apportionment of Representatives in Congress, based on the population without relation to the disfranchised voters in the several States, can be seen by the following comparison of votes in the Congressional election of 1918:

The total vote for Representatives in Congress in Alabama, which has ten Representatives, was 62,345, whereas the total vote for Representatives in Congress in Minnesota, which has ten Representatives, was 299,127, and the total vote in Iowa, which has ten Representatives, was 316,377, and the total vote in California, which has eleven Representatives, was 644,790. The total vote for Representatives in Congress in Georgia, which has twelve Representatives, was 59,196, whereas the total vote for Representatives in Congress in New Jersey, which has twelve Representatives, was 338,461, and the total vote in Indiana, which has thirteen Representatives, was 565,216. The total vote for Representatives in Congress in Louisiana, which has eight Representatives, was 44,794, whereas the total vote for Representatives in Congress in Kansas, which has eight Representatives, was 425,641. The total vote for Representatives in Congress in Florida, which has four Representatives, was 31,613, whereas the total for Representatives in Congress in Colorado, which has four Representatives, was 208,855, and the total vote in Maine, which has four Representatives, was 121,836. The total vote for Representatives in Congress in South Carolina, which has seven Representatives in Congress, was 25,433, whereas the total vote for Representatives in Congress in Nebraska, which has six Representatives in Congress, was 216,014, and the total vote in

With national woman suffrage the disproportion in the vote of these States, except in case of those which already had woman suffrage, would be nearly double, so that national woman suffrage not only increases the inequality and injustice of the present unconstitutional methods, but magnifies the offense against law and order and political justice.

As representation in the electoral college is based upon Congressional representation, the following figures in relation to the Presidential election of 1916 are of interest:

The States of Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia cast a total vote for all Presidential candidates of 1,870,209. In Congress these States have a total of 104 Representatives and in the electoral college these eleven States have 126 votes. The State of New York alone cast a total vote for all Presidential candidates of 1,706,354 and has only 43 Representatives in Congress and 45 votes in the electoral college. The state of Illinois cast a total vote for all Presidential candidates of 2,192,707 and has only 27 Representatives in Congress and 29 votes in the electoral college. The State of Pennsylvania cast a total vote for all Presidential candidates of 1,297,097 and has only 36 Representatives in Congress and 38 votes in the electoral college. The State of Ohio cast a total vote for all Presidential candidates of 1,065,086 and has only 22 Representatives in Congress and 24 votes in the electoral college.

The total vote cast for all candidates for President in 1916 was 18,528,743. The votes of the States of Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia were just 10 per cent. of this vote, yet these States have a representation in Congress of about 25 per cent. of the membership. With national woman suffrage the figures, when available, will indicate that these States cast only about 5 per cent. of the total vote for President in 1920 and yet have 25 per cent. of the membership of the House of Representatives.

The House of Representatives, under the present apportionment, consists of 435 members, each member representing 211,877 inhabitants. As there has been an increase in the population of the United States during the last ten years, according to the census of 1920, of 13,710,842 people, if the present base of representation were used, there would be an addition to the membership to the House of Representatives of sixty-five members. This addition to the membership of the House could be entirely

avoided by having the same unit as the base of representation and by enforcing the Fourteenth Amendment in accordance with the Constitution.

It is my intention to ask the attendance at the hearings before the Rules Committee and the Census Committee of the House of Representatives of all national organizations interested in the maintenance of law and order and the enforcement of the Constitution, bar associates [*sic*], societies for the preservation of the Constitution, organizations for constitutional liberty, woman suffrage associations and others.

A new bill for reapportionment of representation will never pass the House of Representatives unless the bill accords with the directions of the Fourteenth Amendment of the Constitution without most bitter and serious opposition.

If the House of Representatives passes a reapportionment bill which is plainly unconstitutional by avoiding the enforcement of the Fourteenth Amendment, it is now my intention to question the constitutionality of the election of the next House of Representatives by legal process and appeal to the Supreme Court for a determination of these great questions and the restoration of political equality and justice in the United States.

#### d. Letter of Senator Glass (Va.)

[*Chicago Tribune*, Nov. 16, 1927.]

The attempt to draw an analogy between the attitude of the south on the question of Negro suffrage and the position of persons intent upon nullifying the eighteenth amendment to the federal constitution is simply stupid. If one were to impute literal truth to the alleged analogy, the conclusive answer would be that the south's resistance to the fifteenth amendment was intended to avert the wretched consequences of the unspeakable crime involved in the adoption of the amendment.

The amendment was adopted in the passions of war and constituted an attempt to destroy white civilization in nearly one-third of the nation and to erect on its ruin an Ethiopian state, ignorant, profligate, corrupt, controlled by manumitted slaves, not 1 per cent. of them semi-literate, and these led by a band of white miscreants, execrated figures in the nightmare of reconstruction.

On the other hand, resistance to the enforcement of the eighteenth amendment and the statute enacted in pursuance thereof

is not designed to avert crime, but to facilitate it. In effect, it amounts to condonation. It is intended to stimulate defiance of both the constitution and the law.

The childish endeavor to extenuate this encouragement to crime by contrasting it with the perfectly constitutional and legitimate action of the southern states in averting the blight of black supremacy will not deceive anybody with mind enough to draw distinctions; least of all will it frighten any public man of the section thus threatened, whether he favor or disapprove the eighteenth amendment.

It is exceedingly doubtful whether the fifteenth amendment ever was constitutionally ratified. At best, it was done at the point of the bayonet under a species of military terrorism that was in itself a crime.

Not only is there no federal statute providing for the enforcement of the fifteenth amendment which the people of any southern state "deride, detest and spit upon," as I once heard a United States senator passionately boast about the prohibition amendment, but there is no constitutional or statutory law in the code of a single southern state that violates the terms of the fifteenth amendment to the federal constitution.

This has been put to the test again and again in actions before the Supreme Court of the United States.

I very cordially invite you to point to a single sentence in the constitutional or statutory law of Virginia, for example, which disfranchises a voter "on account of race, color, or previous condition of servitude." The white people of Virginia, within the limitations of the federal constitution, have complete control of their state affairs, without the least fear of disturbance by the blacks and with just as little fear of threats by Negropholist newspapers and politicians favoring the repeal of the eighteenth amendment to the federal constitution.

I think this is true of every southern state, which, within the restrictions of the federal constitution, has legislated against the characteristics and habits of those who are too ignorant, too simple and too corruptible en bloc to administer government.

## 59. FEDERAL ELECTIONS LAW

Although Congress is given the power to regulate the times, places and manner of electing Senators and Representatives, its first action under this power was in 1842, when it provided the district system for the election of Representatives. Since that time several other acts have been passed regulating such elections, but the most notable is probably that of 1871, passed



especially in view of the adoption of the Fifteenth Amendment. It forms one of the series commonly known as the "Force Acts," and is the only one to have stood the test of constitutionality.<sup>1</sup>

[*U. S. Statutes at Large*, vol. 16, pp. 433-440.]

CHAP. XCIX. *An Act to amend an Act approved May thirty-one, eighteen hundred and seventy, entitled "An Act to enforce the Rights of Citizens of the United State to vote in the several States of this Union, and for other Purposes."*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section twenty of the "Act to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes," approved May thirty-one, eighteen hundred and seventy, shall be, and hereby is, amended so as to read as follows:—

"*Sec. 20. And be it further enacted*, That if, [at] any registration of voters for an election for representative or delegate in the Congress of the United States, any person shall knowingly personate and register, or attempt to register, in the name of any other person, whether living, dead, or fictitious, or fraudulently register, or fraudulently attempt to register, not having a lawful right so to do; or do any unlawful act to secure registration for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or other unlawful means, prevent or hinder any person having a lawful right to register from duly exercising such right; or compel or induce, by any of such means, or other unlawful means, any officer of registration to admit to registration any person not legally entitled thereto, or interfere in any manner with any officer of registration in the discharge of his duties, or by any such means, or other unlawful means, induce any officer of registration to violate or refuse to comply with his duty or any law regulating the same; or if any such officer shall knowingly and wilfully register as a voter any person not entitled to be registered, or refuse to so register any person entitled to be registered; or if any such officer or other person whose duty it is to perform any duty in relation to such registration or election, or to ascertain, announce, or declare the result thereof, or give

<sup>1</sup> The other acts were the Force Act of May 31, 1870, the Ku Klux Act of Apr. 20, 1871, and the Civil Rights Act of Mar. 1, 1875. These were held unconstitutional in *U. S. v. Reese* (1876), 92 U. S. 214; *U. S. v. Harris* (1882), 106 U. S. 629; and *Civil Rights Cases* (1883), 109 U. S. 3.

or make any certificate, document, or evidence in relation thereto, shall knowingly neglect or refuse to perform any duty required by law, or violate any duty imposed by law, or do any act unauthorized by law relating to or affecting such registration or election, or the result thereof, or any certificate, document, or evidence in relation thereto, shall knowingly neglect or refuse to perform any duty required by law relating to or affecting such registration or election, or the result thereof, or any certificate, document, or evidence in relation thereto, or if any person shall aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, or to omit any act the omission of which is hereby made a crime, every such person shall be deemed guilty of a crime, and shall be liable to prosecution and punishment therefor as provided in section nineteen of said act of May thirty-one, eighteen hundred and seventy, for persons guilty of any of the crimes therein specified: *Provided*, That every registration made under the laws of any State or Territory for any State or other election at which such representative or delegate in Congress shall be chosen, shall be deemed to be a registration within the meaning of this act, notwithstanding the same shall also be made for the purpose of any State, territorial, or municipal election."

SEC. 2. *And be it further enacted*, That whenever in any city or town having upward of twenty thousand inhabitants, there shall be two citizens thereof who, prior to any registration of voters for an election for representative or delegate in the Congress of the United States, or prior to any election at which a representative or delegate in Congress is to be voted for, shall make known, in writing, to the judge of the circuit court of the United States for the circuit wherein such city or town shall be, their desire to have said registration, or said election, or both, guarded and scrutinized, it shall be the duty of the said judge of the circuit court, within not less than ten days prior to said registration, if one there be, or, if no registration be required, within not less than ten days prior to said election, to open the said circuit court at the most convenient point in said circuit. And the said court, when so opened by said judge, shall proceed to appoint and commission, from day to day and from time to time, and under the hand of the said circuit judge, and under the seal of said court, for each election district or voting precinct in each and every such city or town as shall in the manner herein prescribed, have applied therefor, and to revoke, change, or renew said appointment from time to time, two citizens, resi-

dents of said city or town, who shall be of different political parties, and able to read and write the English language, and who shall be known and designated as supervisors of election. And the said circuit court, when opened by the said circuit judge as required herein, shall therefrom and thereafter, and up to and including the day following the day of election, be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.

. . . . .

SEC. 4. *And be it further enacted*, That it shall be the duty of the supervisors of election, appointed under this act, and they and each of them are hereby authorized and required, to attend at all times and places fixed for the registration of voters, who, being registered, would be entitled to vote for a representative or delegate in Congress, and to challenge any person offering to register; to attend at all times and places when the names of registered voters may be marked for challenge, and to cause such names registered as they shall deem proper to be so marked; to make, when required, the lists, or either of them, provided for in section thirteen of this act, and verify the same; and upon any occasion, and at any time when it attendance under the provisions of this act, to personally inspect and scrutinize such registry, and for purposes of identification to affix their or his signature to each and every page of the original list, and of each and every copy of any such list of registered voters, at such times, upon each day when any name may or shall be received, entered, or registered, and in such manner as will, in their or his judgment, detect and expose the improper or wrongful removal therefrom, or addition thereto, in any way, of any name or names.

SEC. 5. *And be it further enacted*, That it shall also be the duty of the said supervisors of election, and they, and each of them, are hereby authorized and required, to attend at all times and places for holding elections of representatives or delegates in Congress, and for counting the votes cast at said elections; to challenge any vote offered by any person whose legal qualifications the supervisors, or either of them, shall doubt; to be and remain where the ballot-boxes are kept at all times after the

polls are open until each and every vote cast at said time and place shall be counted, the canvass of all votes polled be wholly completed, and the proper and requisite certificates or returns made, whether said certificates or returns be required under any law of the United States, or any State, territorial, or municipal law, and to personally inspect and scrutinize, from time to time, and at all times, on the day of election, the manner in which the voting is done, and the way and method in which the poll-books, registry-lists, and tallies or check-books, whether the same are required by any law of the United States, or any State, territorial, or municipal law, are kept; and to the end that each candidate for the office of representative or delegate in Congress shall obtain the benefit of every vote for him cast, the said supervisors of election are, and each of them is, hereby required, in their or his respective election districts or voting precincts, to personally scrutinize, count, and canvass each and every ballot in their or his election district or voting precinct cast, whatever may be the indorsement on said ballot, or in whatever box it may have been placed or be found; to make and forward to the officer who, in accordance with the provisions of section thirteen of this act, shall have been designated as the chief supervisor of the judicial district in which the city or town wherein they or he shall serve shall be, such certificates and returns of all such ballots as said officer may direct and require, and to attach to the registry list, and any and all copies thereof, and to any certificate, statement, or return, whether the same, or any part or portion thereof, be required by any law of the United States, or of any State, territorial, or municipal law, any statement touching the truth or accuracy of the registry, or the truth or fairness of the election and canvass, which the said supervisors of election, or either of them, may desire to make or attach, or which should properly and honestly be made or attached, in order that the facts may become known, any law of any State or Territory to the contrary notwithstanding.

SEC. 19. *And be it further enacted*, That all votes for representatives in Congress shall hereafter be by written or printed ballot, any law of any State to the contrary notwithstanding; and all votes received or recorded contrary to the provisions of this section shall be of none effect.

*Approved*, February 28, 1871.

## 60. INSTRUCTION OF MEMBERS OF CONGRESS

There has always been considerable discussion and difference of opinion over the function of a representative in democratic government. Edmund Burke argued that a representative is chosen by the people to think and act for them, and that, once chosen, he is a free and independent agent. Others hold that a representative is chosen merely as a convenient mouth-piece of the people, and that he is therefore always subject to their will, so far as that can be determined. The latter view has probably had the widest acceptance in the United States, and it was not unusual for a state legislature, before the change to popular election, to instruct the Senators (and occasionally even the Representatives) from that state how to vote on particular measures. Such instructions may also be given expressly or impliedly in party platforms and otherwise, although in every case the difficulty of assuring respect for such instructions is obvious.

## a. View of Senate, 1791

[*Journal of William Maclay* (ed. 1927, published by A. & C. Boni), pp. 387-388.]

*February 24th, Thursday.*—This day nothing of moment engaged the Senate in the way of debate until the Virginia Senators moved a resolution that the doors of the Senate chamber should be opened on the first day of the next session, etc. They mentioned their instructions. This brought the subject of instructions from the different Legislatures into view.

Elsworth said they amounted to no more than a wish, and ought to be no further regarded. Izard said no Legislature had any right to instruct at all, any more than the electors had a right to instruct the President of the United States. Mr. Morris followed; said Senators owed their existence to the Constitution; the Legislatures were only the machines to choose them; and was more violently opposed to instruction than any of them. We were Senators of the United States, and had nothing to do with one State more than another. Mr. Morris spoke with more violence than usual.

Perhaps I may be considered as imprudent, but I thought I would be wanting in the duty I owed the public if I sat silent and heard such doctrines without bearing my testimony against them. I declared I knew but two lines of conduct for legislators to move in—the one absolute volition, the other responsibility. The first was tyranny, the other inseparable from the idea of representation. Were we chosen with dictatorial powers, or were we sent forward as servants of the public, to do their business? The latter, clearly, in my opinion. The first question,

then, which presented itself was, were my constituents here, what would they do? The answer, if known, was the rule of the Representatives. Our governments were avowedly republican. The question now before us had no respect to what was the best kind of government; but this I considered as genuine republicanism.

## b. Instructions of New York Legislature, 1836

[*Laws of New York, 59th Session, 1836*, pp. 810-811.]

### STATE OF NEW-YORK.

*In Assembly, January 26, 1836.*

Whereas the senate of the United States did, on the 28th day of March, 1834, adopt a resolution in these words, viz:

“*Resolved*, That the president in the late executive proceedings, in relation to the public revenue, has assumed upon himself authority and power not conferred by the constitution and laws, but in derogation of both.” And whereas such act is regarded by the legislature of the state of New-York as an assumption of power, on the part of the said senate, and a usurpation of the constitutional powers of the house of representatives, calculated to subvert the fundamental principles of our government: Therefore,

*Resolved*, (if the senate concur,) That the senators of this state in congress be, and they are hereby instructed to use their best efforts to procure the passage of a resolution directing the aforesaid resolution to be expunged from the journal of the senate of the United States, in the manner indicated by a resolution pending in the house of delegates of the state of Virginia, on the 4th day of January, instant, to wit: “by causing black lines to be drawn around the resolution in the original manuscript journal, and these words plainly written across the face of the said resolution and entry: ‘Expunged by order of the senate of the United States,’ or in such other manner as may be best calculated to attain the object intended.”

*Resolved*, That this legislature regard the right of instruction as founded upon the very basis of representation, and as the natural result of the connexion between constituent and representative, and also that the representative is bound to obey the instructions of his constituents or to resign the power with which they have entrusted him.

*Resolved*, That the governor of this state be requested to trans-

mit a copy of the foregoing resolutions to each of the senators and representatives in congress from this state, and that the said senators be requested to lay them before the senate of the United States.

By order,

CHARLES HUMPHREY, *Speaker*.

P. Reynolds, Jr. *Clerk*.

STATE OF NEW-YORK.

*In Senate, February 3, 1836.*

*Resolved*, That the senate do concur with the assembly in the said resolutions.

By order,

JOHN TRACY, *President*.

John F. Bacon, *Clerk*.

### c. Instructions of Democratic Party of South Carolina, 1926

[Resolution of Democratic State Convention, held at Columbia, S. C., May 19, 1926. Text in *Congressional Record*, vol. 67, p. 9844.]

#### RESOLUTION 1

Whereas Hon. Cole L. Blease, United States Senator, has introduced in Congress a bill to regulate the employment of certain persons by the United States Government, which reads as follows:

*"Be it enacted, etc.,* That from and after the passage of this act no person not a citizen of the United States shall be employed by any official of the United States Government in any of its departments in any capacity whatsoever: *Provided*, That any person not a citizen of the United States, who has duly made and filed his or her application for citizenship in the United States pending the decision on such application, will be eligible for temporary employment; but if such application is denied, or the person so employed does not become a naturalized citizen within the time provided by law, such employment must cease.

"SEC. 2. Any violation of this act by any official of the United States Government shall be punished by immediate dismissal from office."

Whereas we believe that such legislation is badly needed and will work for the best interests of the people of the United States, and that same will, if enacted into law, bring about a better feeling and understanding among the laboring people of this country,

and will serve as an inducement to aliens within our borders to become naturalized citizens, and being appreciative of his efforts in this direction and of his 100 per cent Americanism: Now, therefore, be it

*Resolved*, That the Democratic Party of South Carolina, in State convention assembled, go on record as indorsing said bill, and requests all of South Carolina's Representatives in Congress to support the same.

By Hon. Ben. E. Adams, of the Charleston delegation.



# CHAPTER X

## CONGRESS: WORKING METHODS AND PROCEDURE

### 61. PARTY CAUCUS

Among the most important institutions affecting the working of Congress is the party caucus. Although not provided for by constitution, statute, or rule of either house, the caucus is probably the dominant factor in the organization of each house and in the determination of legislative policy. The methods of organizing and controlling the caucus, and the character of its functioning, are therefore of the greatest importance.

#### a. Democratic House Caucus Rules

[Furnished through the courtesy of Representative John W. Garrett, of Tennessee.]

#### PREAMBLE

In adopting the following rules for the Democratic Caucus, we affirm and declare that the following cardinal principles should control Democratic action:

- a. In essentials of Democratic principles and doctrine, unity.
- b. In nonessentials, and in all things not involving fidelity to party principles, entire individual independence.
- c. Party alignment only upon matters of party faith or party policy.
- d. Friendly conference and, whenever reasonably possible, party cooperation.

#### DEMOCRATIC CAUCUS RULES

1. All Democratic Members of the House of Representatives shall be prima facie members of the Democratic Caucus.
2. Any member of the Democratic Caucus of the House of Representatives failing to abide by the rules governing the same shall thereby automatically cease to be a member of the Caucus.
3. Meetings of the Democratic Caucus may be called by the Chairman upon his own motion and shall be called by him whenever requested in writing by twenty-five members of the Caucus or at the request of the Party Leader.

4. A quorum of the Caucus shall consist of a majority of the Democratic Members of the House.

5. General parliamentary law, with such special rules as may be adopted, shall govern the meetings of the Caucus.

6. In the election of officers and in the nomination of candidates for office in the House, a majority of those present and voting shall bind the membership of the Caucus.

7. In deciding upon action in the House involving party policy or principle, a two-thirds vote of those present and voting at a Caucus meeting shall bind all members of the Caucus: *Provided*, The said two-thirds vote is a majority of the full Democratic membership of the House: *And provided further*, That no member shall be bound upon questions involving a construction of the Constitution of the United States or upon which he made contrary pledges to his constituents prior to his election or received contrary instructions by resolutions or platform from his nominating authority.

8. Whenever any member of the Caucus shall determine, by reason of either of the exceptions provided for in the above paragraph, not to be bound by the action of the Caucus on those questions, it shall be his duty, if present, so to advise the Caucus before the adjournment of the meeting, or if not present at the meeting, to promptly notify the Democratic leader in writing, so that the party may be advised before the matter comes to issue upon the floor of the House.

9. That the five-minute rule that governs the House of Representatives shall govern debate in the Democratic Caucus, unless suspended by a vote of the Caucus.

10. No persons, except Democratic Members of the House of Representatives, a Caucus Journal Clerk, and other necessary employees, shall be admitted to the meetings of the Caucus.

11. The Caucus shall keep a journal of its proceedings, which shall be published after each meeting, and the yeas and nays on any question shall, at the desire of one-fifth of those present, be entered on the journal.

#### b. Proceedings of Democratic House Caucus

[*N. Y. Times*, Feb. 14, 1924.]

House Democrats in a caucus ending early tonight [Feb. 13] pledged themselves to stand solidly back of the Garner plan, including the 44 per cent. surtax maximum in the tax reduction debate which will begin tomorrow.

Of the 168 Democrats present at the meeting, only two, Representative Hawes of Missouri and Representative Deal of Virginia, favored the Mellon bill. After deliberation the caucus bound Mr. Hawes to abide by the majority decision and to vote for the Garner rates, but excused Mr. Deal on the ground that he had promised his constituents before election that he would vote for the Mellon plan.

Seven other Democrats asked to be excused from voting for the Garner maximum on the basis that they had told their constituents they would not vote to reduce surtaxes lower than at present. The caucus recognized these promises given to supporters, and released them from the party obligation. The result will be that they will vote first for the Frear surtax maximum, and when that is defeated, as it probably will be, they will support the Garner figure.

The seven men were said to be Representatives Rankin of Mississippi, Wolff of Missouri, Hill of Washington, Cannon of Missouri, Wilson of Mississippi, Underwood of Ohio and Taylor of West Virginia. . . .

Under the caucus agreement tonight, all Democrats in the House were bound to vote for the surtax and normal rates and individual exemptions in the Garner plan, except the few men who were excused. Under the rules of the Democratic caucus, a two-thirds majority may bind all the members of the party in the House, so the 168 men present this afternoon were many more than were necessary out of the full representation of 207.

It was said after the caucus that while Representative Hawes stood for the 25 per cent. surtax rates, it was found impossible to allow him to cast his vote for it, because he did not come within the caucus exception which says no member shall be bound "upon questions involving a construction of the Constitution of the United States or upon which he made contrary pledges to his constituents prior to his election or received contrary instructions by resolution or platform from his nominating authority." Any of the thirty-nine Democrats who were absent from the caucus will be excused from conforming to the majority stand on the tax question if they can show they have qualified under the exceptions stated.

An interesting sidelight of the Democratic caucus was that Representative Wefald, the Farmer-Labor Representative from Minnesota, sat in it as an interested spectator. He said later he was given to understand his presence was not wanted at the re-

cent Republican conference on taxes, but that the Democrats had welcomed him today.

### c. Proceedings of Republican House Caucus

[*N. Y. Times*, Feb. 28, 1925.]

Nicholas Longworth of Ohio, the majority floor leader, was nominated for Speaker of the House in the next Congress by a vote of 140 to 84 over Martin B. Madden of Illinois, Chairman of the Appropriations Committee, at a caucus tonight [Feb. 27] of the Republicans of the next House. Representative John Q. Tilson of Connecticut was unanimously named to succeed Mr. Longworth as floor leader.

These nominations were made in less than an hour and a half. The action is equivalent to their election, for the Republicans of the next House will out-number the Democrats by sixty-two.

According to an arrangement between Representatives Begg of Ohio and Britten of Illinois, respectively Longworth and Madden campaign managers, the nomination was carried through with dispatch. In five-minute speeches Representative Burton of Ohio named Mr. Longworth and Representative Cole of Iowa seconded the nomination, while Representative Chindblom of Illinois nominated Mr. Madden and Representative Newton of Minnesota made the seconding speech.

The result settled a bitter fight which had been going on practically ever since Congress convened last December and which had become intensive during the last week. Up to the actual opening both sides were claiming victory, Mr. Begg saying he had 135 votes for Mr. Longworth, and Mr. Britten insisting that Mr. Madden would be nominated on the first ballot by more than 121 votes.

After the roll call showed that Mr. Longworth had won, Mr. Madden moved to make the vote unanimous. Mr. Longworth immediately walked over to Mr. Madden and shook his hand.

Mr. Longworth also addressed the caucus, saying he appreciated its action, not only because of the honor carried by the Speakership, but because of the confidence shown in him by his party associates in naming him for that high office. . . .

Representative Hawley was Chairman of the caucus and Representative Sweet was chosen Secretary. Representative Butler of Pennsylvania was absent, but was elected Vice Chairman. Representative Vare asked that Mr. Butler be recorded as voting for Mr. Madden for Speaker and this was agreed to.

Republican membership in the new House will total 245, but only about 225 were present at the caucus. Many men elected last November and who are not in the present House came to Washington for the meeting.

The caucus decided that the Committee on Committees, composed of one man from the Republican delegation of each State, should go ahead, whenever it pleased, to name members for committee assignments, and it was also settled, according to precedent, that each member of the committee should be authorized to cast votes equal to the number of Republicans in his State delegation.

Great curiosity had been felt as to the probable action of the ten Wisconsin Radicals, and Representatives Keller of Minnesota, LaGuardia of New York and Sinclair of North Dakota, whom the regular Republicans had decided to exclude from the caucus on the ground that they had worked against the party's nominees, Coolidge and Dawes, in the campaign of last year. Mr. Sinclair had announced that he would demand admission to the caucus and would remain there until rejected. None of the Radicals, however, attended the caucus tonight. . . .

The caucus renominated the present regular officers of the House, including William Tyler Page to be the clerk.

Just before the caucus adjourned the question of punishing the insurgents in connection with committee assignments was brought up. Mr. Britten made a plea for Representative Lampert of Wisconsin and Mr. Newton of Minnesota defended Mr. Keller of Minnesota.

Representative Snell of New York, Chairman of the Rules Committee, offered a motion that no member who had not supported the Presidential nominee in the last election should have a place on committees. No vote was taken and the whole subject was referred to the Committee on Committees, which will meet on March 5 to make the committee assignments.

## 62. REVOLUTION OF 1910-11

For a considerable number of years prior to 1910, the House proceedings had been dominated by the Speaker. Besides the usual powers of a presiding officer, the Speaker had in his own hands the appointment of all standing committees and was himself the controlling member of the Committee on Rules. Through these means he had become the most powerful force in legislation, and was usually considered second in importance only to the President. The growing resentment of members against the vigorous use of these powers was reflected in the characterization of Speaker Thomas B. Reed as "Czar" Reed, and of the speakership of Joseph G. Cannon as

“Cannonism.” This resentment culminated in 1910 in an alliance between the Democratic minority and about forty “insurgent” Republicans, who revolted against the system that had been established, forced the adoption of more liberal rules, and stripped the Speaker of some of his power.

### a. Norris Resolution of March 19, 1910

[Offered by Mr. Norris (Neb.; Rep.), and adopted by vote of 191-156. *Congressional Record*, vol. 45, pt. 4, p. 3429.]

*Resolved*, That the rules of the House of Representatives be amended as follows:

“1. In Rule X, paragraph 1, strike out the words ‘on Rules, to consist of five Members.’”

“2. Add new paragraph to Rule X, as follows:

“‘Paragraph 5. There shall be a Committee on Rules, elected by the House, consisting of 10 Members, 6 of whom shall be Members of the majority party and 4 of whom shall be Members of the minority party. The Speaker shall not be a member of the committee and the committee shall elect its own chairman from its own members.’”

*Resolved further*, That within ten days after the adoption of this resolution there shall be an election of this committee, and immediately upon its election the present Committee on Rules shall be dissolved.

### b. House Debate

[*Congressional Record*, vol. 45, pt. 4, pp. 3430, 3436-3437.]

MR. CLARK of Missouri. Mr. Speaker, no man in this presence realizes more thoroughly than I do the seriousness as well as the importance of this occasion. I want to make one personal remark; whether it will be popular or not I do not know, and to tell you the truth I do not care. This is not a personal fight, so far as I am concerned, or ever has been, against the Hon. Joseph G. Cannon, from the State of Illinois, personally. [Loud applause on both sides of the Chamber.] I can lay my hand on my heart and truthfully assert that the personal relations between that distinguished personage and myself have always been pleasant.

So far as I am concerned and as far as the men who have cooperated with me are concerned, so far as I know, this is fight against a system. We think it is a bad system, as far as this Committee on Rules has been concerned. It does not make any

difference to me that it is sanctified by time. There never has been any progress in this world except to overthrow precedents and take new positions. [Applause.] There never will be. Reformers and progressives are necessarily and inevitably iconoclasts.

I want to say another thing, so far as I am concerned. There is no other proposition pending in my mind on my own initiative or by agreement with anybody except the one that is pending here today. I have believed ever since I was in the House long enough to understand the work of the Committee on Rules that the fact that the Speaker of the House was chairman of that committee, and practically the Committee on Rules, gives the Speaker of this House more power than any one man ought to have over the destinies of this Republic. [Applause on the Democratic side.]

Macaulay says that Sir Robert Walpole was avaricious of power. I am not certain but that the illustrious historian might without exaggeration have extended that remark so as to include the entire human race within its scope. It is for that very reason that restrictions, constitutional and otherwise, are placed upon public men—even upon hereditary kings, emperors, and potentates. And every such new restriction smashes precedents. We had made up our mind months ago to try to work the particular revolution that we are working here to-day, because, not to mince words, it is a revolution. I have no fear of revolutions, for men of our blood revolutionize in the right direction. The enlargement of the Committee on Rules even in itself has some beneficent features attached to it, simply that and nothing more, because it takes into consideration, as the gentleman from Wisconsin [Mr. Cooper] stated the other night, the larger portion of the country. But I am not giving my adhesion to any proposition concerning this rules business that does not remove the Speaker now, and, so far as we can control it, for all time to come, from the Committee on Rules. [Applause on the Democratic side.] That is my position, and in that I speak for the Democrats of the House and the insurgent Republicans. [Applause on the Democratic side.] We are fighting to rehabilitate the House of Representatives and to restore it to its ancient place of honor and prestige in our system of government.

I do not believe that men in this world are heard for much speaking or that much attention is paid to it after it is done, and it seems to me that I have stated our whole contention.

You can not restore to the membership of this House the

quantum of power that each Member is entitled to without taking from the Speaker of the House some quantum of the power he now enjoys, because he practically enjoys it all. On this proposition I could wish that there could be a unanimous vote of this House, but that is a hope too fantastic for entertainment. We want to try this experiment. If it does not work well, Mr. Speaker, the House at any time can change it, because it has now been definitely settled that this House can do what it pleases when it wants to do it. [Applause on the Democratic side.]

. . . . .

THE SPEAKER. Gentlemen of the House of Representatives: Actions, not words, determine the conduct and the sincerity of men in the affairs of life. This is a government by the people acting through the representatives of a majority of the people. Results can not be had except by a majority, and in the House of Representatives a majority, being responsible, should have full power and should exercise that power; otherwise the majority is inefficient and does not perform its function. The office of the minority is to put the majority on its good behavior, advocating, in good faith, the policies which it professes, ever ready to take advantage of the mistakes of the majority party, and appeal to the country for its vindication.

From time to time heretofore the majority has become the minority, as in the present case, and from time to time hereafter the majority will become the minority. The country believes that the Republican party has a majority of 44 in the House of Representatives at this time; yet such is not the case.

The present Speaker of the House has, to the best of his ability and judgment, cooperated with the Republican party, and so far in the history of this Congress the Republican party in the House has been enabled by a very small majority, when the test came, to legislate in conformity with the policies and the platform of the Republican party. Such action of course begot criticism—which the Speaker does not deprecate—on the part of the minority party.

The Speaker can not be unmindful of the fact, as evidenced by three previous elections to the Speakership, that in the past he has enjoyed the confidence of the Republican party of the country and of the Republican Members of the House; but the assault upon the Speaker of the House by the minority, supplemented by the efforts of the so-called insurgents, shows that the Democratic minority, aided by a number of so-called insurgents,



constituting 15 per cent of the majority party in the House, is now in the majority, and that the Speaker of the House is not in harmony with the actual majority of the House, as evidenced by the vote just taken.

There are two courses open for the Speaker to pursue—one is to resign and permit the new combination of Democrats and insurgents to choose a Speaker in harmony with its aims and purposes. The other is for that combination to declare a vacancy in the office of Speaker and proceed to the election of a new Speaker. After consideration, at this stage of the session of the House, with much of important legislation pending involving the pledges of the Republican platform and their crystallization into law, believing that his resignation might consume weeks of time in the reorganization of the House, the Speaker, being in harmony with Republican policies and desirous of carrying them out, declines by his own motion to precipitate a contest upon the House in the election of a new Speaker, a contest that might greatly endanger the final passage of all legislation necessary to redeem Republican pledges and fulfill Republican promises. This is one reason why the Speaker does not resign at once; and another reason is this: In the judgment of the present Speaker, a resignation is in and of itself a confession of weakness or mistake or an apology for past actions. The Speaker is not conscious of having done any political wrong. [Loud applause on the Republican side.] The same rules are in force in this House that have been in force for two decades. The Speaker has construed the rules as he found them and as they have been construed by previous Speakers from Thomas B. Reed's incumbency down to the present time.

Heretofore the Speakers have been members of the Committee on Rules, covering a period of sixty years, and the present Speaker has neither sought new power nor has he unjustly used that already conferred upon him.

There has been much talk on the part of the minority and the insurgents of the "czarism" of the Speaker, culminating in the action taken to-day. The real truth is that there is no coherent Republican majority in the House of Representatives. [Loud applause on the Republican side.] Therefore, the real majority ought to have the courage of its convictions [applause on the Republican side], and logically meet the situation that confronts it.

The Speaker does now believe, and always has believed, that this is a government through parties, and that parties can act only through majorities. The Speaker has always believed in

and bowed to the will of the majority in convention, in caucus, and in the legislative hall, and to-day profoundly believes that to act otherwise is to disorganize parties, is to prevent coherent action in any legislative body, is to make impossible the reflection of the wishes of the people in statutes and in laws.

The Speaker has always said that, under the Constitution, it is a question of the highest privilege for an actual majority of the House at any time to choose a new Speaker, and again notifies the House that the Speaker will at this moment, or at any other time while he remains Speaker, entertain, in conformity with the highest constitutional privilege, a motion by any Member to vacate the office of the Speakership and choose a new Speaker [loud applause on the Republican side] ; and, under existing conditions, would welcome such action upon the part of the actual majority of the House, so that power and responsibility may rest with the Democratic and insurgent Members who, by the last vote, evidently constitute a majority of this House. The Chair is now ready to entertain such motion. [Loud and long-continued applause on the Republican side; great confusion in the Hall.]

[A resolution to declare the office of Speaker vacant was promptly offered, but was rejected by a vote of 155-192. On April 5, 1911, new rules were adopted, depriving the Speaker also of his power to appoint the standing committees and providing instead for their election by the House.]

### 63. SELECTION OF COMMITTEES

The standing committees of the Senate have, practically since the beginning, been elected by the Senate itself, and those of the House have also been similarly elected since the so-called "revolution of 1910-11." However, the above statement sets forth only the formal process of selection. The actual assignments of members to committees are now made in each house by the Committee on Committees, chosen by the party caucus, and guided primarily by party considerations.

#### a. Senate Rules with respect to Selection of Committees

[*Senate Manual, 1925, p. 27.*]

### RULE XXIV

#### APPOINTMENT OF COMMITTEES

1. In the appointment of the standing committees, the Senate, unless otherwise ordered, shall proceed by ballot to appoint severally the chairman of each committee, and then, by one ballot,

the other members necessary to complete the same. A majority of the whole number of votes given shall be necessary to the choice of a chairman of a standing committee, but a plurality of votes shall elect the other members thereof. All other committees shall be appointed by ballot, unless otherwise ordered, and a plurality of votes shall appoint.

2. When a chairman of a committee shall resign or cease to serve on a committee, and the Presiding Officer be authorized by the Senate to fill the vacancy in such committee, unless specially otherwise ordered, it shall be only to fill up the number on the committee.

### b. House Rules with respect to Selection of Committees

[*House Manual and Digest*, 1925 (House Document No. 661, 68th Cong., 2d Sess.), pp. 286-291.]

## RULE X OF COMMITTEES

1. There shall be elected by the House, at the commencement of each Congress, the following standing committees. . . . [Here follows an enumeration of these committees.]

2. The Speaker shall appoint all select and conference committees which shall be ordered by the House from time to time.

3. At the commencement of each Congress the House shall elect as chairman of each standing committee one of the members thereof; in the temporary absence of the chairman the member next in rank in the order named in the election of the committee, and so on, as often as the case shall happen, shall act as chairman; and in case of a permanent vacancy in the chairmanship of any such committee the House shall elect another chairman.

4. All vacancies in standing committees of the House shall be filled by election by the House.

### c. Party Methods in Selection of Committees

[News Item in *N. Y. Times*, Mar. 6, 1925.]

The Sixty-ninth Congress began to function in part today [Mar. 5] when the Senate met in special session for the transaction of "executive" business, by proclamation of President Coolidge. Prior to its meeting there was a caucus of Republi-

can Senators, at which Senator Moses was chosen by acclamation for President pro tempore of the Senate in place of Senator Cummins of Iowa, who declined to accept re-election to that important office after six years' service.

Subsequently the Republican Committee on Committees of the Senate and House held separate sessions in which they got down to the work of recasting the personnel of committees. In doing so they showed an inclination to conform to President Coolidge's desires, although nothing came to light to indicate that the President was making any effort to influence them. Tomorrow there will be a caucus of Senate Republicans to confirm what the Committee on Committees arranged today.

Formal notice to the insurgents of the House that they would not be recognized as Republicans came this afternoon, when the Committee on Committees not only left Representative Frear of Wisconsin off the Ways and Means Committee, but passed a resolution declaring that no one would be recognized as a Republican who did not support the Coolidge-Dawes ticket in the last campaign.

Acting under this resolution, the Committee on Committees will refuse to include the ten Wisconsin radicals and Representatives Keller of Minnesota, LaGuardia of New York and Sinclair of North Dakota as belonging to the majority, but will assign them to committee memberships as if they belonged to an independent party. This will place them in a class by themselves, as the Senate Committee on Committees arranged to do with nominal Republican Senators who deserted the party last year. Although elected to the new Congress as a Socialist, Mr. LaGuardia still claims that he is entitled to Republican affiliations.

In addition to displacing Senators LaFollette of Wisconsin, Brookhart of Iowa and Ladd and Frazier of North Dakota, from the senior positions which their Republican classification gave them on committees, the Senate Committee on Committees made assignments of new Republican Senators and shifted around some others. The most interesting shift concerned Senator Wadsworth of New York and Senator Butler of Massachusetts. Mr. Wadsworth will remain as Chairman of the Committee on Military Affairs, but he will be transferred from the Committee on Foreign Relations to the Committee on Finance.

This shift was in accordance with Mr. Wadsworth's wish. Senator Butler, however, was credited with not finding satisfaction in his transfer from the Judiciary Committee to the Foreign Relations Committee, but in giving him membership in the

latter body in place of Senator Wadsworth President Coolidge's effort for American adhesion to the World Court is considerably strengthened.

Senator Butler wanted a place on the Finance Committee. It was indicated today that there was a disinclination to put him there because he is a large manufacturer and there might be criticism of including him in the committee which handles tariff and taxation measures and other legislation having to do with financial and business affairs.

Mr. Butler, who managed President Coolidge's pre-convention and election campaign, still is Chairman of the Republican National Committee. He is a close personal as well as political friend of Mr. Coolidge and generally regarded as the President's personal representative in the Senate. Another Senator regarded in the same light is Frederick H. Gillett, Mr. Butler's Massachusetts colleague, who became a Senator yesterday within an hour after he had ceased to be Speaker of the House. Mr. Gillett was anxious to get the place on the Foreign Relations Committee which Senator Butler accepted rather reluctantly.

Senator Gillett felt that he was entitled to have the committee assignment he most cherished. His contention was that a man who had served in the House of Representatives for thirty-two years and had been its Speaker should not be treated as a new and untried Senator. He asked for the Committee on Foreign Affairs, and was understood to have said that he wanted that assignment and that alone. The Committee on Committees, however, determined that Mr. Gillett should go to the Judiciary Committee for his most important committee assignment, taking the place left vacant by the transfer of Mr. Butler to the Foreign Relations Committee. Senator Gillett's other assignments were to the Committees on Education and Labor and on Enrolled Bills.

Senator Watson of Indiana, Chairman of the Committee on Committees, was slated to be Chairman of the Committee on Interstate Commerce, which handles legislation relating to the railroads. He will displace Senator Smith of South Carolina, a Democrat, who was elected Chairman by a combination of Democrats and LaFollette Republicans in the Congress which died yesterday. Senator LaFollette was the senior Republican member of this committee, and its Chairmanship would have gone to him under the seniority rule if he had not set up his Third Party last year with the purpose of defeating President Coolidge.

As things were arranged today, Mr. LaFollette, with Messrs.

Brookhart, Ladd and Frazier, will be put at the end of committee lists, along with the sole Farmer-Laborite, Mr. Shipstead of Minnesota. They will be junior in each case to the lowest ranking Democratic member. Mr. LaFollette will lose the Chairmanship of the Committee on Manufactures and will take the place of Magnus Johnson, Farmer-Laborite of Minnesota, who passed out of the Senate yesterday. That is, he and his associates will have these lowly committee places if they care to take them. It may be that they will refuse to serve on any committee.

Another Republican radical who supported LaFollette's Presidential aspirations last year will also lose a Chairmanship—Senator Ladd, who was Chairman of the Committee on Public Lands and Surveys in the last Congress. That committee achieved much prominence through the fact that it conducted the investigation into the naval oil leases. Senator Stanfield of Oregon will become Chairman in his place.

Of the new Republican Senators who began their services yesterday Messrs. Goff of West Virginia, Sackett of Kentucky and Pine of Oklahoma will be assigned to the Committee on Interstate Commerce.

No announcement of the assignments made by the Republican Committee on Committees was made today. The list will be laid before the Republican caucus tomorrow and, if approved, will be made public.

Senator Norris of Nebraska, who has shown an independence of the Republican Party and was cold to the Coolidge-Dawes ticket last year, will be allowed to retain the Chairmanship of the Committee on Agriculture.

The transfer of Senator Butler to Senator Wadsworth's place on the Foreign Relations Committee bears on the World Court recommendation of President Coolidge. Mr. Wadsworth, while friendly to the President's policies, voted against the Harding-Hughes plan of American adhesion to the court which Mr. Coolidge has endorsed, and in favor of the so-called Pepper plan, which is regarded as designed to make American participation in the World Court under Senator Pepper's conditions unacceptable to the league. Senator Butler is for the President's plan.

...

The resolution passed by the Republican Committee on Committees of the House read:

"It is voted that in the selection of the committees we rec-

ognize as Republicans only those who supported the Republican national ticket and platform in the last campaign.”

Only one of the House insurgents was affected by the selections made today. Representative Frear, of Wisconsin, was left off the Ways and Means Committee. Consideration of what places the other twelve radicals will occupy did not come up, for the reason that the only Republican Committee memberships picked were for the Committees on Appropriations and Interstate Commerce, and no radicals were on these committees. Assignment of memberships on other committees was deferred until just before the next meeting of the House, probably in December.

For the Ways and Means Committee Representatives Bixler of Pennsylvania, Faust of Missouri, and Aldrich of Rhode Island, were chosen to succeed Messrs. Frear, Young of North Dakota, who resigned from Congress last year, and Tilson, who leaves the committee by virtue of his new post as floor leader. In the last Congress this committee was composed of twenty-six men, but the Republican organization decided today to limit it to twenty-five, divided between fifteen Republicans and ten Democrats, instead of fifteen Republicans and eleven Democrats.

On the Appropriations Committee Representatives Clague of Minnesota, and Simmons, of Nebraska, were designated to succeed Messrs. Davis, of Minnesota, who was defeated, and Anderson, of the same State, who did not stand for re-election. The size of the committee was left at twenty-one Republicans and fourteen Democrats, so that it could be divided into seven sub-committees of three Republicans and two Democrats each.

Many names of candidates were submitted for membership on the Interstate Commerce Committee, but Representatives Fredericks of California, Robinson of Iowa, Phillips of Pennsylvania, and Garber of Oklahoma, were picked to serve.

The Committee on Committees decided to increase the Interstate Commerce Committee from 21 to 23. The Democrats were allowed to retain their nine men, but the Republicans added two to its membership.

A tentative decision was reached to make the ratio of major committees 13 to 8, instead of 12 to 9, this change being based on the increased Republican membership of the House.

Representatives Green of Iowa, and Madden of Illinois, were renamed as Chairmen, respectively, of the Ways and Means Committee and Appropriations Committee, and Representative Parker of New York was designated to take the place of ex-Rep-

representative Winslow of Massachusetts, who was Chairman of the Interstate Commerce Commission [Committee].

While there seems to be no question that the insurgents will be set down as independents, the actual disposition of them was left to a sub-committee headed by Representative Tilson. This sub-committee will make all Republican selections for committees other than those named today, and will submit them just before the convening of Congress.

#### 64. SENIORITY RULE

One of the customs of long standing in both houses is that which elevates members to the chairmanship of committees upon the basis of their seniority of service on such committees. New members are regularly assigned to the bottom of committees, and can hope to reach places of influence only after long service. With only a very few exceptions, this rule of seniority has been regularly applied, without any regard for the special qualifications of the members involved, or even for their political sympathies and readiness to cooperate with the majority. Thus Senator Borah was given the chairmanship of the important Committee on Foreign Relations because of his seniority in service, although completely out of sympathy with the foreign policies of President Coolidge or of the majority in the Senate itself. For some time there has been considerable criticism of this practice, well typified by the following letter.

[Letter of Senator McCormick to Senator Lodge, 1922. Text in *N. Y. Times*, Nov. 13, 1922.]

Dear Senator Lodge:

You know that I was greatly disappointed not to see you in Massachusetts before sailing to Europe, there to see my mother and to make some study of economic conditions. I wanted to talk with you again upon the urgency of putting aside the rule under which the Chairmen of the Senate Committees are chosen by reason of their seniority of service on the committees and for no other reason, and to talk with you, too, about the constitution of a steering committee which may be truly representative of the average opinion of the Republican majority in the Senate, and which in collaboration with the steering committee of the House may labor energetically and effectively to enact our legislative program.

We owe the country the creation of such a steering committee and the abolition of the binding seniority rule. I can speak so frankly to you because of the intimate consideration which you have always shown me, and because of your own energetic and representative activity. But we do know that although in



a majority of instances the men who have become chairmen through seniority have been good chairmen, there have been others who were unfitted for their posts by reason of extreme old age or of failing health, or because of grave differences of opinion with the majority of their Republican associates.

Certainly I would be the last to challenge the right or the duty of a Senator to assert his independent opinion, or to differ with any majority. A Senator is elected to represent his constituency according to his best judgment and his conscience, but the chairman of a committee acts not in his sole representative capacity, but as the representative of the majority of that committee of the majority in the Senate to which he belongs. Naturally, more, he is the executive agent of the committee, burdened with the labors of the committee, and required vigilantly to press for the consideration of the bills reported by it.

The old system served very well in the old days. In the majority of cases, as I have already said, the majority of chairmen who have come to their posts under the seniority rule have been representative and capable chairmen, but the Republican conference and the Republican steering committee owe it to the country to put aside the rule, just as the conference owes it to the country to make provision for the selection of a truly representative steering committee, which shall meet regularly and which, as occasion may require, shall meet with the corresponding committee of the House.

There is no other way in which we can dispatch the great volume of business devolved upon Congress as a consequence of the war, bring the sessions of Congress to a reasonably early conclusion, and, finally, make certain that we write legislation which represents the common judgment of the majority of the country and meets its pressing needs.

I wish I might have talked this over with you, as I have had opportunity to talk it over with other Senators during the campaign, and since the campaign with Curtis. I feel very certain that you will agree with us, and I write now in the hope that if Congress reassembles before the end of my hurried journey to Europe you will have counseled with other Senators, to the end that we may do our duty to the country.

Always faithfully yours,

MEDILL McCORMICK.

## 65. CONFERENCE COMMITTEE

In case the two houses fail to agree on a bill, the measure is then submitted to a committee representing both houses, which attempts to smooth out the points in disagreement. If agreement is reached by this committee, an identical report is made to each house under rules that prevent amendment but permit only acceptance or rejection of the report as a whole. Since in practice the houses are compelled to resort to conference on practically all important legislation, the importance of the conference committee as a legislative organ can hardly be over-emphasized.

### a. Composition of Conference Committee

[*Congressional Record*, vol. 66, pt. 3, pp. 2552-2553, 2555, 2557, 2561.]

The PRESIDING OFFICER laid before the Senate the action of the House of Representatives disagreeing to the amendments of the Senate to the bill (H. R. 518) to authorize and direct the Secretary of War, for national defense in time of war and for the production of fertilizers and other useful products in time of peace, to sell to Henry Ford, or a corporation to be incorporated by him, nitrate plant No. 1, at Sheffield, Ala.; nitrate plant No. 2, at Muscle Shoals, Ala.; Waco Quarry, near Russellville, Ala.; steam power plant to be located and constructed at or near Lock and Dam No. 17, on the Black Warrior River, Ala., with right of way and transmission line to nitrate plant No. 2, Muscle Shoals, Ala.; and to lease to Henry Ford, or a corporation to be incorporated by him, Dam No. 2 and Dam No. 3 (as designated in H. Doc. No. 1262, 64th Cong., 1st Sess.), including power stations when constructed as provided herein, and for other purposes, and requesting a conference with the Senate on the disagreeing votes of the two Houses thereon.

MR. UNDERWOOD. I move that the Senate insist on its amendments and agree to the conference asked by the House.

The motion was agreed to.

MR. UNDERWOOD. Now, I want to explain the motion that I intend to make. It is rather unusual. I did not include in my previous motion that the Chair appoint the conferees on the part of the Senate. I think in a case of this kind the conferees should reflect the sentiment of the Senate in regard to the bill. In fact, on page 205 of the Senate Manual, in discussing the question, this statement is made:

Of course, the majority party and the prevailing opinion have the majority of the managers.

Unfortunately the senior members of the committee are not in favor of the bill or the view of the Senate as the bill passed, and as the rules of the Senate authorize or require the election of conferees, except by unanimous consent, and desiring to have conferees to reflect the viewpoint of the Senate with reference to the bill, without in any way intending to reflect on the other members of the committee who have expressed their own views, and solely with the purpose of having Senate conferees respond to the House and see if they can work out a conclusion satisfactory to both Houses, I move that the Senator from New Hampshire [Mr. Keyes], the Senator from Illinois [Mr. McKinley], and the Senator from Mississippi [Mr. Harrison] be appointed the conferees, on the part of the Senate.

MR. SMOOT. Mr. President, I will say to the Senator that that is rather an unusual move.

MR. UNDERWOOD. I have just said so.

MR. SMOOT. What the Senator has said is correct, but it is always understood in the Senate that when the Senate appoints conferees the conferees shall take the judgment expressed by the majority vote in this body. They are to stand for the Senate amendments or, if it is a Senate bill, they are to stand against the House amendments to the bill. It seems to me that it is going outside the usual course, as the Senator admits, to make a motion to appoint conferees rather than to follow the general custom.

MR. UNDERWOOD. I will say to the Senator that of course my motion is strictly within the rule. It is a rule of the Senate. The custom of the Senate, of course, has been that the proposer of a bill or the chairman of a committee, when it comes to the point where a conference is asked, shall move that the Senate insist on its amendments, agree to a conference, and that the Chair appoint the conferees on the part of the Senate, and the Chair usually says, "Without objection, it is so ordered"; otherwise the Senate would always elect conferees.

It happens in this case that there is a very distinct line of determination in regard to the bill. One side is in favor of a Government corporation operating the plant. There is no dispute about that at all. That side is represented by the chairman of the Committee on Agriculture and Forestry, who very sincerely and earnestly represents that particular view and has not yielded a particle on it. Knowing him as I do, I know full well that he will not yield, because he is earnest and sincere and is going to

stand for what he believes. His position is that we should have Government operation of the plant. . . .

The bill that I introduced, and which is in accord with the message of the President of the United States, is primarily in favor of leasing the property if a lessee can be obtained. It does provide that if a lease can not be made then there shall be Government operation, and that is solely because this is a national defense plant and must be operated by the Government if it can not be operated by an individual. But the real line of demarkation is that Senators on the other side of the question, as represented by the chairman of the Committee on Agriculture and Forestry, believe primarily that it should be operated by the Government. They have been perfectly sincere in their argument and they have made that argument to the last moment that the question was before the Senate. I do not doubt their sincerity at all.

The position I take is that it is the part of wisdom to attempt to get a lessee to operate the plant on a contract made by the President, and that was the viewpoint expressed by the last vote of the Senate, which was 50 to 30. The House has asked for a conference and I think it is no reflection whatever on Senators who view it the other way that the Senate should send to the conference conferees who believe in the idea of operating the plant under lease rather than under Government ownership and operation as a primary object.

Of course, this is not the final vote. The conferees will meet and if they reach a conclusion they must bring it back to the Senate. When it comes back the Senate will then have an opportunity to express its view as to whether it agrees to the report of the conferees. But according to the rules and the precedents, I think we are entitled to conferees who reflect the last vote of the Senate in passing the bill. That is all I am asking, that they go to the conference reflecting the viewpoint of the Senate. . . .

MR. SIMMONS. It is our rule, heretofore observed, so far as I know, to appoint as conferees the ranking members of the majority and ranking member of the minority. What I desire to say is that the Senate ought in the first instance to rely upon the good faith of those gentlemen, without any regard to their attitude when the matter was before the Senate, to carry out in conference the will of the Senate as expressed in its ultimate action. I know of no precedent against that; but we came very near establishing such a precedent at the last session of Congress, when

the situation was, I think, identical with the situation which the Senator now presents to the Senate.

In the consideration of the revenue bill passed during the last session the majority members of the Senate—all of them, I think, except one—had opposed very strenuously the ultimate action of the Senate as to certain very important and vital phases of that bill, just as in the case before the Senate to-day.

The chairman of the committee and some of the other members of the committee, who under the ordinary practice of the Senate would have been entitled to appointment as conferees, strenuously opposed the action which was finally taken by the Senate. The contention of the minority having been adopted by the Senate in the revenue bill, I was concerned then, as ranking member of the minority, as the Senator from Alabama now is concerned, about what might be the attitude of the chairman of the committee, the distinguished Senator from Utah [Mr. Smoot], and his two associates who would have been entitled under the rules to appointment as conferees with him. I was concerned with the course they might pursue in the conference, because of their strenuous opposition to the action of the Senate; and I considered, together with my colleagues on this side and those on the other side who had acted with us in the incorporation into the bill of these provisions that were so much opposed by the majority on the other side, as to what course we should pursue; whether or not we should do exactly what the Senator proposes to do now, and make a demand that the Senate in the first instance name the conferees, and name only such conferees as were favorable to the bill in the form in which it passed the Senate.

Mr. President, in those conditions we seriously took into consideration the fact that the majority of the conferees who under our rules would be appointed might probably be opposed to the action of the Senate in the conference as they had been upon the floor of the Senate. We finally resolved that by deciding it to be good policy, as well as in the interest of harmony in the Senate, that we should not by our action express distrust of the sincerity and good faith of those gentlemen, but that we should assume, as a matter of course, that they would discharge their obligation to the Senate, and in conference, whatever might have been their attitude when the measure was pending in the Senate, would stand by the final action of the Senate upon those vital matters. . . .

MR. NORRIS. . . . Now, I want to discuss this proposition as it is related to the custom of the Senate. I knew that if the

custom of the Senate prevailed I would be appointed to head the conferees on the part of the Senate on this bill. I was somewhat surprised when I discovered that there was quite a movement on foot to prevent my being appointed. If I had been appointed and had served, I would have done just what the Senator from North Carolina has said another Senator did against whose appointment there was opposition. I would have represented the Senate and would have done all I could honorably to have the action of the Senate prevail in the conference. I would not accept a place on a conference committee with any other idea. But, as I have said, I had determined, even before any suggestions had been made, that I would not accept appointment on the conference committee, because, to my mind, I would almost have to stultify myself. I did not believe in the bill; I had no faith in the action taken by the Senate; I was sincerely bitterly opposed to it, and it seemed to me that I should eliminate myself and ought to stay off the committee.

I would not have accepted appointment on the committee under any other condition than the understanding that I represented not myself, but the Senate, and I would have felt it my duty to back up the action of the Senate, just as an attorney must look after the interests of his client; and if he can not do it, he should not take the case. He has a right in the beginning to refuse to be retained. I had the right to refuse to be appointed, and would exercise it. . . .

Personally, I do not believe in that custom of the Senate. I think the fundamental proposition that those friendly to legislation should be appointed on conference committees is correct. I do not believe I ought to be on the conference committee. . . .

MR. MCKELLAR. I offer the following motion: I move, as a substitute for the motion of the Senator from Alabama [Mr. Underwood], that, in accordance with the usual custom of the Senate, the Chair be requested to appoint as conferees on the part of the Senate on H. R. 518 the chairman of the Committee on Agriculture and Forestry [Mr. Norris] and Mr. McNary, the next Republican on the committee, and Mr. Smith, of South Carolina, the ranking Democrat on the committee. . . .

MR. UNDERWOOD. On the substitute of the Senator from Tennessee, I demand the yeas and nays.

The yeas and nays were ordered. . . .

The result was announced—yeas 35, nays 33. . . .

So Mr. McKellar's motion was agreed to.

## b. Power of Conference Committee

[*Congressional Record*, vol. 62, pt. 12, pp. 12806-12808.]

MR. SIMMONS. . . . It was generally known when the [tariff] bill was in the making that the organized and special interests whose influence dominated and controlled the formulation of its policy naturally expected some rebuffs and upsets both in the House and Senate, but that they confidently relied upon the committee of conference on the disagreeing votes of the two Houses to correct such errors, so regarded from their standpoint, by nullifying, overruling, and setting aside any action regarded by them as prejudicial to their interests and plans. It was and is known that the rules governing conference reports of both Houses, especially of the Senate, powerfully lend themselves to such a consummation, particularly in the case of tariff bills dealing with hundreds and even thousands of different items.

The record of the conference report on the bill is a startling verification of the confidence of the special interests whose plans had in part been thwarted by the two Houses, and impressively uncovers and discloses the dangers to the integrity of popular legislation which lurk in the conference system as now interpreted and applied. The arbitrary and usurpatory course of the conferees, their disregard, not to say contempt, of the known will of the two Houses, and their apparent subserviency to the will of the special interests, can best be illustrated by their action with respect to three or four outstanding matters of vital importance in the bill. With respect to two of those outstanding matters, namely, potash and the dyestuffs embargo, the House has already acted, and in that action administered to the conferees a severe and cutting rebuke. I refer to those two matters now only as instances showing the disposition of the conferees toward the House on the one hand and the special interests on the other hand. . . .

Why, Mr. President, do these designing interests rely more upon the conference committee's action than they do upon the action of either House? First, the body is smaller. Second, they know perfectly well, and the conferees know, that however obnoxious their action with reference to a specific matter may be, where the bill relates, as a tariff bill does, not only to that particular thing but to hundreds and thousands of other things of more or less importance, whatever their action may be with respect to the particular item that action must be accepted by the

two Houses, or their whole action upon all the items must be rejected, for a conference report is not subject to amendment on the floor. It is the reliance, I say, of the special interests upon these facts and it is the significance of these facts, leading to these abuses of power, to this disregard of the expressed will of the two Houses, to this trampling under foot of the action of one or the other of the Houses by the conferees—and frequently by the conferees of the very House that acted—that have become a thing of such great danger in our system of legislation and that ought in some way or other to be remedied.

Mr. President, I do not wish to indulge in any lengthy discussion of the embargo. There the same thing happened in conference in an even more obnoxious form than happened in the case of potash, and probably more than in the case of potash it accentuates the point I have made, namely, that of the advantage given to the special interests, and of the impunity with which the public interests may be disregarded with respect to the specific thing involved.

There was an attempt to continue the dyestuffs embargo. It was written in the House bill as it came from the Committee on Ways and Means. It was strenuously advocated and championed by the Ways and Means Committee upon the floor of the House. One member of the Ways and Means Committee of the House has become recognized throughout the country as the special champion of the principle of embargo as applied to dyestuffs. His activities have been so pronounced and so conspicuous that he stands out and overshadows all the other champions of that measure in the House, just as I think the Senator from Utah [Mr. Smoot] probably overshadows all other champions of a duty upon potash. This House Member's efforts in behalf of this embargo provision of the House bill were strenuous. The debate was full, as debates go in the House, spirited, able, and as a result the House struck the embargo provision out of the bill.

When the bill came over to the Senate the embargo provision was restored in the Committee on Finance, notwithstanding the action of the House. The influence of the dyestuffs lobby was strong enough to dominate and control the action both of the committee of the House and the committee of the Senate. They forced this embargo provision back into the bill in the Senate committee after the House had stricken it out in a very impressive way, almost in a sensational way, and the bill came upon the floor of the Senate, where another battle was waged against it, a hot and spirited battle. Never before in all the history of legis-



lation since I have been here has there been such a powerful lobby around this Capitol as came here in support of the dye-embargo proposition. They swarmed the corridors, they forced themselves into the private offices of Senators, they hung around the doors of the Senate Chamber, they could not be shaken off, they yielded to no rebuff. . . . They prevailed with the Finance Committee; but when the bill came here to the floor, after thorough discussion and deliberation, the Senate followed the course of the House and overruled its committee and struck out the embargo provision by repealing the embargo provision of existing law; and so the bill went to conference, the last resort of the special interest, the tribunal in which it is at so much greater advantage than in the open session of either House, the tribunal upon which it always confidently relies to correct what it regards as the errors of the two Houses and to bring out legislation in accordance with its own plans and wishes.

The conference committee restored these embargo provisions with a time limit. Was not this a clear case of yielding the will of the two Houses, as expressed in as emphatic, impressive, and forceful manner as legislative will possibly can be expressed, and overruling that will of both Houses in order to do what a favored special interest demands shall be done? Such an outrage is, of course, shocking and without excuse. The House acted, however, and promptly disapproved the action of the conferees with reference to dyestuffs and potash and directed its conferees to eliminate them.

Of course, the conferees then corrected both of these things, but only because they were forced to do so. I am now referring to these instances because in the situation upon which I have commented, which is illustrated by these two incidents, there lies serious danger to the integrity of legislation and to the ultimate writing into law of the will of the people with reference to these vital matters.

## 66. FILIBUSTERING

Among the practices in Congress most subject to criticism is that of filibustering, that is, the use by a minority of various parliamentary tactics in such a way as to delay proceedings and prevent action on pending measures. On account of the greater freedom allowed by the Senate rules, filibustering is easily carried on in that body, although it has not been made completely impossible even in the House.

a. Round-Robin Statement relative to Armed Merchant Ship Bill

[*Congressional Record*, vol. 54, pt. 5, p. 4988.]

United States Senate,  
Washington, D. C., March 3, 1917.

The undersigned United States Senators favor the passage of S. 8322, to authorize the President of the United States to arm American merchant vessels and to protect American citizens in their peaceful pursuits upon the sea. A similar bill has already passed the House of Representatives by a vote of 403 to 13. Under the rules of the Senate allowing debate without limit it now appears to be impossible to obtain a vote prior to noon, March 4, 1917, when the session of Congress expires. We desire this statement entered in the *Record* to establish the fact that the Senate favors the legislation and would pass it if a vote could be had.

[Then follow the signatures of 75 Senators.]

b. Justification of Filibustering

[*Congressional Record*, vol. 64, pt. 4, pp. 4093-4094.]

MR. WILLIAMS. Mr. President, I do not believe that "filibustering," as it is called, is ever justified except in two classes of cases: One of them the Senator from Alabama illustrated when he filibustered against the so-called antilynching bill, because that was a bill which proposed to make murder in a State a Federal offense punishable by a Federal court. Of course, if we once step out on the pathway of making common crimes within the States punishable entirely in the Federal courts, or chiefly there, or at all, we shall have deprived the States of their very life, which is their police power. Whatever else might have been said and however great the abuses which ought to be corrected—and they are great, and I regret them, especially in so far as they apply to my own section—the remedy was not in placing the police power of the States in the hands of the Federal Government. . . .

Mr. President, that was one instance where a filibuster is justified, because I think as we stand here as ambassadors of the States in a Congress, just as much so as delegates in a European congress, where the powers are met in concert, are ambassadors from their several governments, and it is our duty, therefore, to protect the State's rights of our constituents. It is a mistake to

assume that there are no States' rights left. They are rapidly disappearing, but there are some yet remaining. Wherever a great, vital, fundamental constitutional question is presented and a majority is trying to override the organic law of the United States, then, I repeat, a filibuster is justified. That was the case to which the Senator from Alabama referred.

But there is another class of cases, and that is when an accidental and incidental temporary majority in a legislative body tries to forestall the future and defeat the will of the majority of the people as expressed at an election, and as will be expressed by a majority of their recently elected representatives. I dare say there is not a man in this body who will have the hardihood to say that the ship subsidy bill can pass through the next Congress. If there be one who has that amount of hardihood, who is capable of that degree of recklessness of assertion, I should like to hear him now tell me that he thinks I am mistaken about it. Ah, Mr. President, the very reason why this bill is being pushed along to a conclusion at this tail end of an expiring Congress, where the "left overs" hold the balance of power, is because every man, from the President in the White House down to the pages upon the floor of the legislative halls, knows that it can not be passed in the next and recently elected Congress of the United States fresh from the people.

I do not believe in delaying legislation. As the Senator from Alabama said, the legislature "must function"; that is true; but it does not follow that it must function in order to put over things to keep a fair expression of the will of the people, as expressed at the last election, from being functioned. Why do you want to put this bill over at this session? Because if you once get it upon the statute books it can not be repealed so long as the present administration is in power, at any rate, because the law repealing it could be and would be vetoed, as everybody knows, and it would take not a majority but two-thirds of both Houses to override the veto. That is the reason. Let us speak plainly to one another and let us speak honestly and candidly to the country. . . .

In order that it may impress itself upon the country, I again say that this effort to pass this bill at this session is immoral and unethical, because it is an attempt to "put over" legislation that the recently elected and true representatives of the people do not want and to rush it through before they can begin to function as the Members of either House; and to impress the other point I repeat that, in my opinion, there is not a man within the sound of

my voice with the hardihood even to *pretend* to believe, even to assert that he does believe that if this legislation does not pass at this session it will pass the next Congress. . . .

## 67. DEBATE RULES

One of the notable differences between the two houses of Congress is in the attitude towards freedom of debate. In the House, with its large membership, debate is severely restricted by the regular rules, and, in addition, special rules are commonly adopted limiting debate still further on particular measures. In the Senate there was, until 1917, practically complete freedom of debate. The filibuster of that year on the Armed Merchant Ship Bill induced the adoption of a mild form of cloture. In fact, the power of individual Senators is still so great as to require unanimous consent for the transaction of a considerable amount of business.

### a. House Debate Rules

[*House Manual and Digest, 1925* (House Document No. 661, 68 Cong., 2 Sess.), pp. 320-326.]

## RULE XIV

### OF DECORUM AND DEBATE

1. When any Member desires to speak or deliver any matter to the House, he shall rise and respectfully address himself to "Mr. Speaker," and, on being recognized, may address the House from any place on the floor or from the Clerk's desk, and shall confine himself to the question under debate, avoiding personality.

2. When two or more Members rise at once, the Speaker shall name the Member who is first to speak; and no Member shall occupy more than one hour in debate on any question in the House or in committee, except as further provided in this rule.

3. The Member reporting the measure under consideration from a committee may open and close, where general debate has been had thereon; and if it shall extend beyond one day, he shall be entitled to one hour to close, notwithstanding he may have used an hour in opening. . . .

6. No Member shall speak more than once to the same question without leave of the House, unless he be the mover, proposer, or introducer of the matter pending, in which case he shall be permitted to speak in reply, but not until every Member choosing to speak shall have spoken.

### b. Special Rule with respect to Ship Subsidy Bill

[Offered by Mr. Campbell, Chairman of House Committee on Rules, Nov. 22, 1922, debated for one hour and 20 minutes, and adopted by vote of 200-110. *Congressional Record*, vol. 63, pp. 37, 44.]

*Resolved*, That upon the adoption of this resolution it shall be in order to move that the House resolve itself into the Committee of the Whole House on the state of the Union for the purpose of considering H. R. 12817, a bill to amend and supplement the merchant marine act, 1920, and for other purposes. General debate on said bill shall continue until the Committee of the Whole House on the state of the Union rises on Saturday, November 25, at which time general debate shall terminate. The time for such general debate shall be divided equally between those in favor of and those opposing the bill and shall be controlled by the chairman and the ranking minority member opposed to the bill of the Committee on the Merchant Marine and Fisheries; that on Monday, November 27, the bill shall be taken up for amendment under the five minute rule; that in the consideration of the bill any appropriations made in the bill shall not be subject to a point of order; that the consideration of the bill for amendments shall continue not later than the hour of 4 o'clock postmeridian on November 29, at which hour the committee shall rise and report the bill back to the House with such amendments as may have been agreed upon; whereupon the previous question shall be considered as ordered on the bill and on all amendments thereto to final passage without intervening motion except one motion to recommit.

### c. Senate Cloture Rule

[*Senate Manual*, 1925, pp. 25-26.]

## RULE XXII

### PRECEDENCE OF MOTIONS

. . . . .  
If at any time a motion, signed by sixteen Senators, to bring to a close the debate upon any pending measure is presented to the Senate, the presiding officer shall at once state the motion to the Senate, and one hour after the Senate meets on the following calender day but one, he shall lay the motion before the Senate and direct that the Secretary call the roll, and, upon the ascer-

tainment that a quorum is present, the presiding officer shall, without debate, submit to the Senate by an aye-and-nay vote the question:

"Is it the sense of the Senate that the debate shall be brought to a close?"

And if that question shall be decided in the affirmative by a two-thirds vote of those voting, then said measure shall be the unfinished business to the exclusion of all other business until disposed of.

Thereafter no Senator shall be entitled to speak in all more than one hour on the pending measure, the amendments thereto, and motions affecting the same, and it shall be the duty of the presiding officer to keep the time of each Senator who speaks. Except by unanimous consent, no amendment shall be in order after the vote to bring the debate to a close, unless the same has been presented and read prior to that time. No dilatory motion, or dilatory amendment, or amendment not germane shall be in order. Points of order, including questions of relevancy, and appeals from the decision of the presiding officer, shall be decided without debate.

#### d. Unanimous Consent Agreement

[*Congressional Record*, vol. 65, pt. 4, pp. 3673-3674.]

THE PRESIDING OFFICER. The morning business is closed.

MR. NORRIS. Mr. President, I ask unanimous consent to take up for consideration Senate Joint Resolution 22, Order of Business No. 174.

If Senators will permit me to say just a word in explanation of it, this is a joint resolution amending the Constitution of the United States, and has the unanimous report of the Judiciary Committee. In effect, it is the same constitutional amendment that the Senate passed at the last Congress. It went to the House, was referred to the proper committee, and came back from that committee with a favorable report. It was then placed on the calendar and lost. The joint resolution provides for fixing the time of beginning and ending of the terms of President, Vice President, and Members of Congress in January instead of the 4th of March.

MR. ROBINSON. Mr. President, may I ask the Senator from Nebraska, a question respecting the joint resolution? Is the joint resolution as reported by the Committee on the Judiciary

identical in form with the joint resolution which passed the Senate at the last session?

MR. NORRIS. It is not identical in form. It is the same in substance.

MR. ROBINSON. Can the Senator state the differences?

MR. NORRIS. The difference is in section 3. That was not contained in the former joint resolution. The committee found on investigation of other parts of the Constitution that section 3 of the present amendment was necessary. There is another place in the Constitution which says that if the election of a President is referred to the House of Representatives on account of the electors not having elected a President, if the election does not take place by the House before the 4th day of March—the words “the fourth day of March” being used in the Constitution—then the Vice President elected by the Senate shall become acting President. The fact that we change the beginning of the term from March to January makes it necessary for us to change that part of the Constitution also, which we have done in section 3. It only carries out the purpose of the original joint resolution.

MR. ROBINSON. I feel justified in asking that the joint resolution go over for the present.

THE PRESIDING OFFICER. Objection is made.

MR. ROBINSON. I do not want to be placed in the attitude of objecting to the consideration of the joint resolution. My recollection is that I supported the joint resolution to which the Senator refers.

MR. NORRIS. The Senator did support it in a very able speech when we had it up before.

MR. ROBINSON. I desire, however, to have an opportunity of examining it. I suggest to the Senator that he withdraw his request for the day.

MR. NORRIS. I will withdraw my request and make this one. Let me see if this will satisfy the Senator from Arkansas and other Senators. I ask unanimous consent that to-morrow immediately after the conclusion of the routine morning we take up this joint resolution.

MR. ROBINSON. I shall be unable to be present to-morrow.

MR. NORRIS. Would Saturday suit the Senator?

MR. ROBINSON. I will ask the Senator to make it a special order for some day early next week.

MR. NORRIS. Then I request that on Monday next, immediately after the completion of the routine morning business—

THE PRESIDING OFFICER. The Chair will inform the Senator from Nebraska that there is a unanimous-consent agreement governing the action of the Senate on Monday.

MR. ROBINSON. The Senator from Nebraska is taking care of that. His proposal is that this special order shall take effect immediately after the disposition of the bill which has already been, in a way, made a special order for that day.

MR. NORRIS. Let me inquire of the Chair whether an agreement has been made that will do away with morning business next Monday?

THE PRESIDING OFFICER. That all depends upon whether the Senate adjourns or recesses on Saturday.

MR. NORRIS. We will try to adjourn. If I should request that immediately upon the conclusion of the routine morning business on Monday we shall take up this joint resolution, that will not interfere with the unfinished business, because we will not take until 2 o'clock to conclude it.

THE PRESIDING OFFICER. The Senator from Nebraska asks unanimous consent that when the Senate concludes its business on Saturday, it take an adjournment until Sunday at noon, and at the conclusion of the memorial services scheduled for Sunday that the Senate adjourn until Monday at 12 o'clock, and that at the conclusion of the routine morning business on Monday the Senate proceed to the consideration of Order of Business 174, Senate Joint Resolution 22, proposing an amendment to the Constitution of the United States fixing the commencement of the terms of President and Vice President and Members of Congress, and fixing the time of the assembling of Congress. Is there objection?

MR. KING. I have no objection to that, but I want to give notice to the Senator that on Monday the bill of the Senator from North Dakota [Mr. Norbeck] will be up for consideration.

MR. NORRIS. Yes; but this proposed agreement applies only to the morning hour. Of course, if we do not get through before the conclusion of the morning hour, nothing will be accomplished; but I feel so confident that the joint resolution will not take any great length of time that I am willing to take that chance. It will not, of course, interfere with the morning business. At 2 o'clock the unfinished business will be laid before the Senate.

MR. KING. I want to state to the Senator that if there should be a disposition to discuss at some length on Monday the bill to which I have just referred some of that discussion might take place during the morning hour.



MR. NORRIS. It is possible, I will concede, that Senators who may think the time is going to be short will avail themselves of the privilege of talking about that bill when this joint resolution is up. Let me change the request.

MR. KING. I suggest making it Tuesday.

MR. NORRIS. I will change the request to Tuesday instead of Monday. Then there certainly will be no objection.

THE PRESIDING OFFICER. The Senator from Nebraska asks unanimous consent that when the Senate concludes its business on Monday next it take an adjournment until Tuesday, and that at the conclusion of the routine morning business on Tuesday the Senate proceed to the consideration of Order of Business 174, Senate Joint Resolution 22. Is there objection? The Chair hears none, and the unanimous-consent agreement is entered into.

## 68. LEGISLATIVE REFERENCE SERVICE

The need for expert assistance to Congress, particularly in supplying pertinent information and in bill drafting, has long been recognized. In 1914 the necessary appropriations were voted, and a Legislative Reference Service was organized in the Library of Congress, since made a Division of that Library with considerably improved facilities. The character of the services rendered is well described by the Librarian of Congress.

*[Report of the Librarian of Congress, 1920, pp. 199-209.]*

. . . . .

The Legislative reference service of the Library does not, like many of the executive bureaus of the Government, make investigations in the field at first hand nor does it initiate such investigations. It is a service for Members of the House and of the Senate only. It acts only upon their request. It was established by Congress to assist the Members and committees thereof in securing exact information of various kinds, from the Library of Congress or elsewhere, drawn from documentary sources bearing on legislation. The relation of it to Congress was aptly put by Hon. Swager Sherley at the hearings before the Committee on the Library in 1912, when he said:

"As to the reference bureau, there should be no great difficulty. You simply want here a corps of men sufficiently trained to give to Congress, or to a proper number of Members on request, data touching any particular question . . . by having a small corps of men, whose duties pertain only to the demands of Congress.

I think you could create a body that could gather together data—could be not the mind of Congress, but, so to speak, the hands and the eyes and the ears of Congress, because all of us, as our work increases with longer tenure, realize the impossibility of making the investigation that we would like to do before coming to a conclusion. No one desires to have Congress have some other body doing its thinking, but all of us would like to have the data collected that would enable us to arrive at better conclusions.”

The language of the appropriation reads as follows:

“Legislative reference: To enable the Librarian of Congress to employ competent persons to gather, classify, and make available in translations, indexes, digests, compilations, and bulletins, and otherwise, data for or bearing upon legislation, and to render such data serviceable to Congress and committees and Members thereof.”

It will be noted from the foregoing table of statistics that this service received more than 1,600 inquiries from Members of Congress during the fiscal year ending June 30, 1920, this being the largest number of demands made upon the service in any year since its inauguration, not excepting the war Congress. The bulk of these inquiries grew out of the postwar problems.

[Then follows a list of subjects upon which inquiries were made and information furnished.]

The foregoing lists of inquiries are selected to indicate the variety of questions that are customarily asked. Inquiries relating to the whole field of the legislative activity of Congress could be enumerated.

For example, there were a large number of questions relating to the treaty of peace and the League of Nations; reconstruction, economic and social; statistics of various kinds; agricultural problems; foreign and domestic commerce; transportation and communication, including the railroad question; shipping and shipbuilding; labor and industry; departmental organization; American history; translations; and various other such problems. They involved investigation of State, Federal, and foreign laws; foreign and domestic statistics and documents; foreign and domestic economic and historical literature, etc.

The method of answering inquiries received from Members may be stated in the main as follows:

1. If the information can be found already in print in the form appropriate to the inquiry in a book, article, document, or report, this is sent to him with the place marked. If the docu-

ment itself is bulky the portion desired by the Member is photostated, the positive being sent to him and the negative kept on file for future reference.

2. If the inquiry involves extracts from various sources the material is selected and typed, the typewritten manuscript furnished the Member and extra copies kept in reserve.

3. If the inquiry involves a digest of legal or other information the digest is made in like manner.

4. Many inquiries involve the compilation of statistical tables in the form suggested by the Member.

5. The inquiry may involve lengthy and laborious research upon a question of economics, history, diplomacy, or law, concerning which there is no printed data that can adequately answer the question in the form desired by the Member. In such cases the investigation is assigned to one or more assistants, who go to the various sources and prepare their reports. These are worked up into an appropriate statement.

6. The inquiry may involve short historical sketches in brief summary form, thus making it unnecessary for the Member to read the more extensive accounts.

In every case in making statements of fact or opinion the Legislative reference service cites the source of information with volume and page in order that any statement thus made may be easily verified. No statements are made upon its own initiative or upon its own authority.

The questions above enumerated are typical of those addressed to the Legislative reference service. Nearly every Member of the Senate and a large proportion of the Members of the House called for information of this character during the past fiscal year. In order to meet this demand there was gradually built up during the past five years a small organization with a specially trained force who had become familiar and were in contact with the vast collections of the Library of Congress, now numbering nearly three million pieces. They knew how to use the indexes, catalogues, and other scientific apparatus for the purpose of gaining the desired information with the least effort and in the shortest time and to present it in systematic and available form. The persons employed in this work—especially in the higher grades—must have a comprehensive general education; postgraduate work or its equivalent in economics, political science, or history; legal training, and the ability to investigate and report with scientific precision. In order to keep this organization in a state of efficiency it is necessary to have this

force of trained investigators employed continuously. It is not feasible to create a new force with each session of Congress. . . .

In considering the question of a Legislative Reference Service the Library is faced by an actual condition. Questions—similar to those enumerated in this report—from Members of Congress seeking information known to exist somewhere in the collections of the Library are inevitable. They were received by the Library before the present Legislative reference service was established. Congress expects this service from the Library and should the Legislative reference service be completely abolished the demand on the part of Congress would still continue.

Outside of the Legislative reference service the Library has no staff for meeting this demand. For inquiries bearing on legislation its information service is organized as follows:

1. The Division of Bibliography, which can furnish to a Member of Congress a list of references to articles, books, and documents on legislative subjects. This assists the Member in gaining a survey of the literature. The Member himself must do his own research to find what he desires.

2. The Reading Room Division, which has jurisdiction over the collections of books which have been classified, catalogued, and put upon the shelves. The Reading Room is organized to deliver to a Member of Congress any publication which may be upon the shelves for which the Member may specifically ask. Beyond that it is not equipped to go. It can not attempt research.

3. The Periodical Division, which has jurisdiction over the newspapers and periodicals. It is equipped only to send a given publication to a Member upon request. It has no staff to search through newspapers or magazines for information that may be desired by a Member.

4. The Division of Documents, which is limited to acquiring and collating foreign and domestic documents. This is legislative material of high value, but the Division of Documents can not undertake to answer inquiries from it.

5. The Division of Law, including the Law Library at the Capitol, whose function is similar to that of the Reading Room in that it is prepared only to furnish specified books. It can furnish to the Member a designated law book or the text of a law to which an exact citation is given. It can not make investigations.

It will readily be seen that the Legislative reference service is the only branch of the Library which can meet the actual need

of Members for exact data and is in a position, if properly provided for, to be of great value in making available legislative information which the Library can not otherwise furnish and which, should the Member or his secretary undertake the investigation, might prove both difficult and lengthy. On the other hand, a Legislative reference service inadequately provided for, necessitating the employment of untrained and improperly educated assistants, is worse than no service at all. Under such circumstances it is impossible to furnish a Member of Congress with prompt, systematic, and exact data.

The Legislative reference service of the Library of Congress does not do bill drafting. The questions of legislative reference and a bill drafting service have usually been considered together and in a number of the States they are combined in a single organization. Congress, however, has created two separate bill drafting services, one for the House and the other for the Senate. Their work is confined entirely to the form of a bill. They do not make investigations bearing upon questions of policy, but begin their work after the policy has been fixed. However, in determining the language of a bill numerous questions of policy arise and it is from this source that a large number of demands upon the Legislative reference service come. The Member or committee in charge of the bill may desire assistance in gathering certain information bearing on the question of policy. They may desire to know the state of existing Federal law, or what State legislation there may be in existence on the subject, or what decisions of the Supreme Court or State courts have been handed down, or whether there is pertinent foreign legislation or experience. They may desire certain translations or digests made of foreign or domestic laws, or certain statistics or economic information or historical data, or a statement of current facts or opinion bearing upon the proposed legislation. By assisting the Member or the committee in this manner, upon his request, the Legislative reference service becomes closely related to the bill drafting service, the latter often raising questions with the Member which lead him to call upon the former.

## 69. AMOUNT OF LEGISLATION

The tremendous amount of legislation enacted by Congress, and the increase in such legislation from year to year, has been a matter for considerable comment. The fact that the number of actual working days is comparatively small and that much of this legislation is acted upon during the closing days of a session is ground for further comment and criticism.

## a. Amount of Legislation, 1789-1925

[*Congressional Record*, vol. 66, pt. 5, p. 5605.]*Number of laws enacted by Congress (1789-1925)*

	Public			Private			Total
	Acts	Resolutions	Total	Acts	Resolutions	Total	
First.....	94	14	108	8	2	10	118
Second.....	64	1	65	12	.....	12	77
Third.....	94	9	103	24	.....	24	127
Fourth.....	72	3	75	10	.....	10	85
Fifth.....	135	2	137	18	.....	18	155
Sixth.....	94	6	100	12	.....	12	112
Seventh.....	78	2	80	15	.....	15	95
Eighth.....	90	2	92	18	.....	18	110
Ninth.....	88	2	90	16	.....	16	106
Tenth.....	87	1	88	17	.....	17	105
Eleventh.....	90	2	92	25	.....	25	117
Twelfth.....	162	6	168	39	.....	39	207
Thirteenth....	167	16	183	88	.....	88	271
Fourteenth....	163	11	174	124	1	125	299
Fifteenth.....	136	20	156	101	.....	101	257
Sixteenth.....	109	8	117	91	.....	91	208
Seventeenth...	130	6	136	102	.....	102	238
Eighteenth....	137	4	141	194	.....	194	335
Nineteenth....	147	6	153	113	.....	113	266
Twentieth....	126	8	134	100	1	101	235
Twenty-first..	143	9	152	217	.....	217	369
Twenty-second	175	16	191	270	1	271	462
Twenty-third..	121	7	128	262	.....	262	390
Twenty-fourth	129	14	143	314	1	315	458
Twenty-fifth..	138	12	150	376	6	382	532
Twenty-sixth..	50	5	55	90	2	92	147
Twentys-eventh	178	23	201	317	6	323	524
Twenty-eighth	115	27	142	131	6	137	279
Twenty-ninth..	117	25	142	146	15	161	303
Thirtieth.....	142	34	176	254	16	270	446
Thirty-first....	88	21	109	51	7	58	167
Thirty-second..	113	24	137	156	13	169	306
Thirty-third...	161	27	188	329	23	352	540
Thirty-fourth..	127	30	157	265	11	276	433

	Public			Private			Total
	Acts	Resolutions	Total	Acts	Resolutions	Total	
Thirty-fifth . . .	100	29	129	174	9	183	312
Thirty-sixth . . .	131	26	157	192	21	213	370
Thirty-seventh . . .	335	93	428	66	27	93	521
Thirty-eighth . . .	318	93	411	79	25	104	515
Thirty-ninth . . .	306	121	427	228	59	287	714
Fortieth . . . . .	226	128	354	380	31	411	765
Forty-first . . . .	313	157	470	235	64	299	769
Forty-second . . .	514	16	530	450	2	452	982
Forty-third . . . .	392	23	415	441	3	444	859
Forty-fourth . . .	251	27	278	292	10	302	580
Forty-fifth . . . .	255	48	303	430	13	443	746
Forty-sixth . . . .	288	84	372	250	28	278	650
Forty-seventh . . .	330	89	419	317	25	342	761
Forty-eighth . . .	219	65	284	678	7	685	969
Forty-ninth . . . .	367	57	424	1,025	3	1,028	1,452
Fiftieth . . . . .	508	62	570	1,246	8	1,254	1,824
Fifty-first . . . . .	470	80	550	1,633	7	1,640	2,190
Fifty-second . . . .	347	51	398	318	6	324	722
Fifty-third . . . . .	374	89	463	235	13	248	711
Fifty-fourth . . . .	356	78	434	504	10	514	948
Fifty-fifth . . . . .	449	103	552	866	5	871	1,423
Fifty-sixth . . . . .	383	60	443	1,498	1	1,499	1,942
Fifty-seventh . . .	423	57	480	2,309	1	2,310	2,790
Fifty-eighth . . . .	502	73	575	3,465	1	3,466	4,041
Fifty-ninth . . . .	692	83	775	6,248	1	6,249	7,024
Sixtieth . . . . .	350	61	411	234	1	235	646
Sixty-first . . . . .	525	69	594	285	3	288	882
Sixty-second . . . .	457	73	530	180	6	186	716
Sixty-third . . . . .	342	75	417	271	12	283	700
Sixty-fourth . . . .	400	58	458	221	5	226	684
Sixty-fifth . . . . .	348	56	404	48	.....	48	452
Sixty-sixth . . . . .	401	69	470	120	4	124	594
Sixty-seventh . . . .	550	105	655	275	1	276	931
Sixty-eighth . . . .	632	75	707	289	.....	289	996
Total . . . . .	16,914	2,836	19,750	29,787	523	30,310	50,060

[NOTE.—The distinction between the terms public and private, as used in the Statutes at Large, is somewhat arbitrary. Prior to 1845 a number of laws were printed in both groups; these have been classed as public only, in the above table. The decided reduction in the number of private acts beginning with the Sixtieth Congress was caused primarily by the combining of a large number of pension bills in a single omnibus pension bill.]

### b. Work of the 68th Congress

[Extension of Remarks of Representative Nicholas Longworth, in *Congressional Record*, vol. 66, pt. 5, p. 5472.]

An observation at this point on the negative work of the Congress is timely. In appraising the value of the work of any Congress naturally the mind runs to the positive side, and Congress is given little or no credit for the work required and performed in keeping off the statute books proposed legislation that upon careful consideration is judged to be inimical to the welfare of the people. And it requires and demands as much, if not more, courage negatively to consider some proposed measures than it does to yield to propaganda and importunities in their favor. The country little realizes, I believe, the tremendous amount of not only constructive work but work of prevention transacted in the committees of the House. These committees are veritable beehives. Every conceivable question or proposition is brought to their attention, and according to modern methods the humblest proponent may receive a respectful hearing, to which members of the committee listen attentively. All of this comprises thousands of volumes of hearings and is carefully analyzed and the wheat winnowed from the chaff, but unfortunately unless perchance a sensation is produced now and then this work of Members of Congress on committees is not known nor appreciated by the public.

In all, in a session that consisted of 73 actual working days, we enacted 342 public laws, 38 public resolutions, and 223 private laws and resolutions, or a total of 603 laws and resolutions—an average of at least 8 bills a day. In addition, 69 resolutions were agreed to. That is a record of which I think we can be justly proud, and is a fulfillment of the pledge of our party for businesslike attention to the needs of our country.

It is, furthermore, a continuation of the splendid record of achievement of the first session of the Sixty-eighth Congress. At the close of that session I outlined briefly the work and accomplishments of that session—the change in the rules of the House forced upon us at the beginning of the session making the achievements of both sessions all the more notable—the new revenue bill, the immigration measure, the law to liberalize the World War veterans' act, and many others, making a total of 393 laws and resolutions enacted during that session and a total of 996 laws enacted during the entire Congress. That is a rec-



ord that, so far as I know, has never been equaled, not even during the Sixty-seventh Congress when there were four sessions and when the total number of laws was only 931. In that Congress there were 414 actual days in session, as compared to 215 days in the Sixty-eighth Congress. During the first session of this Congress we acted upon 594 bills out of a total of 929 reported and during the second session upon 659 bills, which is 91 more than were reported during that session, making a total of 1,253 bills acted upon during the Sixty-eighth Congress out of 1,497 reported. . . .

## CHAPTER XI

### THE JUDICIAL SYSTEM

#### 70. CONGRESS AND THE COURTS

The constitutional provisions with respect to the federal judiciary are very meager, hence must be supplemented by statute in order to provide an effective system. The power of Congress over the inferior federal courts is obviously great, but it may be noted that Congress has also considerable power to legislate concerning the organization, jurisdiction, and functioning even of the Supreme Court. The great charter of the federal judicial system is the Judiciary Act of 1789, which has since been amended on numerous occasions, and has been supplemented with other important legislation from time to time.

##### a. Act Decreasing Size of Supreme Court

[*U. S. Statutes at Large*, vol. 14, p. 209.]

CHAP. CCX.—*An Act to fix the Number of Judges of the Supreme Court of the United States, and to change certain Judicial Circuits.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no vacancy in the office of associate justice of the supreme court shall be filled by appointment until the number of associate justices shall be reduced to six; and thereafter the said supreme court shall consist of a chief justice of the United States and six associate justices, any four of whom shall be a quorum; and the said court shall hold one term annually at the seat of government, and such adjourned or special terms as it may find necessary for the despatch of business.*<sup>1</sup>

[Then follows a reconstitution of the judicial circuits.]

Approved, July 23, 1866.

##### b. Act Creating Circuit Courts of Appeals

[*U. S. Statutes*, vol. 26, pp. 826-830.]

CHAP. 517.—*An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes.*

<sup>1</sup> The Supreme Court was again increased to nine by Act of April 10, 1869.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, in each circuit an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein that the circuit judges of the United States, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the United States in their respective circuits now have.

SEC. 2. That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. . . .

SEC. 3. That the Chief-Justice and the associate justices of the Supreme Court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the Chief-Justice or an associate justice of the Supreme Court should attend at any session of the circuit court of appeals he shall preside, and the circuit judges in attendance upon the court in the absence of the Chief-Justice or associate justice of the Supreme Court shall preside in the order of the seniority of their respective commissions.

In case the full court at any time shall not be made up by the attendance of the Chief-Justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: *Provided*, That no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals. A term shall be held annually by the circuit court of appeals in the several judicial circuits at the following places: In the first circuit, in the city of Boston; in the second circuit, in the city of New York; in the third circuit, in the city of Philadelphia; in the fourth circuit, in the city of Richmond; in the fifth circuit, in the city of New Orleans; in the sixth circuit, in the city of Cincinnati; in the seventh circuit, in the city of Chicago; in

the eighth circuit, in the city of Saint Louis; in the ninth circuit, in the city of San Francisco; and in such other places in each of the above circuits as said court may from time to time designate. The first terms of said courts shall be held on the second Monday in January, eighteen hundred and ninety-one, and thereafter at such times as may be fixed by said courts.

SEC. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error otherwise, from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same.

SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue: in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital or otherwise infamous crime.

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.

SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of ap-

peals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

SEC. 15. That the circuit court of appeal in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the Supreme court, to be made from time to time, be assigned to particular circuits.

Approved, March 3, 1891.

### c. Act Abolishing Commerce Court

[Appropriations Act of Oct. 22, 1913. *U. S. Statutes*, vol. 38, pp. 208, 219.]

The Commerce Court, created and established by the Act entitled "An Act to create a Commerce Court and to amend the Act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred eight-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, but such judges shall continue to act under assignment, as in the said Act provided, as judges of the district courts and circuit courts of appeals; and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed.

## 71. CHARACTER OF SUPREME COURT APPOINTMENTS

On account of the power of the Supreme Court, and its important position in the determination of legal and constitutional questions, it is commonly supposed that appointments to that Court are made purely on the basis of high character, legal learning, and judicial experience. However, the fact that the Court has become an important organ for the final determination of matters of national policy and of matters with political, social, and economic significance, has led to the consideration of other factors as well in the selection of the Judges.

### a. View of William H. Seward

[Quoted in Beard, *Rise of American Civilization* (The Macmillan Company), vol. II, p. 8.]

How fitting does the proclamation of its opening close with the invocation: "God save the United States and the honorable court". . . . The court consists of a chief justice and eight associate justices. Of these five were called from slave states and four from free states. The opinions and bias of each of them

were carefully considered by the President and Senate when he was appointed. Not one of them was found wanting in soundness of politics, according to the slaveholders' exposition of the Constitution, and those who were called from the free states were even more distinguished in that respect than their brothers from the slaveholding states.

### b. View of President Roosevelt

[*Selections from the Correspondence of Theodore Roosevelt and Henry Cabot Lodge* (Charles Scribner's Sons), vol. II, pp. 228-230.]

Oyster Bay, N. Y.,  
September 4, 1906.

Personal.

Dear Cabot:

I knew how strongly Moody felt about Lurton. I did not know how you felt. I think you both are entirely in error. I say this frankly because I know you want me to talk frankly. Nothing has been so strongly borne in on me concerning lawyers on the bench as that the *nominal* politics of the man has nothing to do with his actions on the bench. His *real* politics are all important. In Lurton's case, Taft and Day, his two former associates, are very desirous of having him on. He is right on the negro question; he is right on the power of the Federal Government; he is right on the insular business; he is right about corporations; and he is right about labor. On every question that would come before the bench he has so far shown himself to be in much closer touch with the policies in which you and I believe than even White, because he has been right about corporations, where White has been wrong. I have grown to feel most emphatically that the Supreme Court is a matter of too great importance for me to pay heed to where a man comes from. While I have not clearly formulated this plan of which I am about to speak, I am tentatively taking into account the fact that if I appoint Lurton I *may* later be able to appoint Moody then saying "it is true that this is making two appointments from Massachusetts, but I have shown already in my appointment of a Tennessean and an ex-Confederate soldier, nominally a Democrat, that I pay heed only to the real needs of the Court, and I am doing the same thing in this case." I have not definitely made up my mind, but the above represents my present intention. . . .

Ever yours,

THEODORE ROOSEVELT.

Nahant, Mass.

Sept. 10, 1906.

Personal.

Dear Theodore:

Thank you for your letter of the 4th. I am glad that Lurton holds all the opinions that you say he does and that you are so familiar with his views. I need hardly say that those are the very questions on which I am just as anxious as you that judges should hold what we consider sound opinions, but I do not see why Republicans cannot be found who hold those opinions as well as Democrats. The fact that there have been one or two Republican disappointments does not seem to me to militate against the proposition. What I care most about, more than any question of the moment, is the fundamental difference between the nationalist and the separatist. The Republican, like the Federalist and Whig, is by nature a liberal constructionist, and the Democrat, especially the Southern Democrat, is by nature, instinct and training the reverse. What I want on the bench is a follower of Hamilton and Marshall and not a follower of Jefferson and Calhoun whose disciples carried their doctrines into the practical form of secession. After what you have said I have no doubt that Judge Lurton is all right on all the great points you mention and I am not going to trouble you with further arguments on a question where you have made up your mind. I only want you to feel that my opinion is based on very broad and general grounds. I think that you are right about the locality argument, and although I said that to take three or four men from one circuit seemed to me an objection, I did not consider it a very serious one. I think that locality should be considered in the Supreme Court, but I do not think that it should ever be allowed to be dominant. . . .

Ever yrs,

H. C. LODGE.

## 72. INJUNCTIONS AND CONTEMPT OF COURT

The power to issue writs of injunction is one of the most important powers of the courts. It is an especially effective method of judicial restraint since the violation of an injunction constitutes contempt of court and is punishable by the court itself without a jury. The frequent use of the injunction in cases affecting labor, and the sweeping character of some injunctions issued in such cases, have caused much severe criticism of the courts. Decisions such as that in the Debs case appeared to some persons to take away substantial rights without the jury trial which is presumably guaranteed, and to be especially harsh in view of the fact that there had



been no violation of a specific statute. Congress sought to meet these views by including in the Clayton Act, passed in 1914, provisions limiting somewhat the power to issue injunctions in such labor cases, and assuring jury trial in the resulting cases of contempt of court. These provisions have been so interpreted, however, as still to permit the issuance of injunctions of the most drastic character, such as that secured by Attorney General Daughtery in 1922 in the case of the Shopmen's strike of that year.

### a. Power to Issue Injunctions

[*In re Debs* (1895), 158 U. S. 564, 577, 583, 594; 39 L. Ed. 1092, 1100, 1102, 1106.]

Petition for a writ of habeas corpus, by Eugene V. Debs *et al*, to inquire into the cause of and relieve them from imprisonment for contempt under sentences inflicted by the Circuit Court of the United States for the Northern District of Illinois, for disobedience of an injunction of that court commanding them among other things to refrain from obstructing trains engaged in interstate commerce and from interfering with or hindering any trains carrying the mails. *Habeas corpus denied.*

. . . . .

*Mr. Justice Brewer* delivered the opinion of the court:

The case presented by the bill is this: The United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are presented: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty?

. . . . .

Passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only

instrument by which rights of the public can be enforced and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result. . . .

So, in the case before us, the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention. Indeed, it is more to the praise than to the blame of the government, that, instead of determining for itself questions of right and wrong on the part of these petitioners and their associates and enforcing that determination by the club of the policeman and the bayonet of the soldier, it submitted all those questions to the peaceful determination of judicial tribunals, and invoked their consideration and judgment as to the measure of its rights and powers and the correlative obligations of those against whom it made complaint. And it is equally to the credit of the latter that the judgment of those tribunals was by the great body of them respected, and the troubles which threatened so much disaster terminated. . . .

Nor is there in this any invasion of the constitutional right of trial by jury. We fully agree with counsel that "it matters not what form the attempt to deny constitutional right may take. It is vain and ineffectual, and must be so declared by the courts." . . . But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a *court* may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency. . . .

*The petition for a writ of habeas corpus is denied.*

## b. Clayton Act, 1914

[*U. S. Statutes*, vol. 38, pp. 730, 738-740.]

CHAP. 321.—An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, . . .*

SEC. 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint, or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

SEC. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which

might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

SEC. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court. . . .

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information. . . .

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or

action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

. . . . .

Approved, October 15, 1914.

### c. Daugherty Injunction, 1922

[Issued on Sept. 1, 1922, by District Judge James H. Wilkerson, at the request of Attorney General Daugherty; renewed on several occasions and made permanent on July 12, 1923. Text in Mott, *Materials Illustrative of American Government* (Century Company), pp. 151-157.]

UNITED STATES OF AMERICA,

*Complainant,*

v.

RAILWAY EMPLOYEES' DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, Bert. M. Jewell, President, J. F. McGrath, Vice President, and John Scott, Secretary and Treasurer; International Brotherhood of Blacksmiths, Drop Forgers and Helpers, etc.,

*Defendants.*

Injunction Writ

District Court of the United States,	} ss.
Northern District of Illinois,	
Eastern Division.	

IN EQUITY NO. 2943

THE UNITED STATES OF AMERICA

To Railway Employees' Department of the American Federation of Labor, and Bert. M. Jewell, President, and John Scott, Secretary and Treasurer thereof, in their respective individual and official capacities and as representatives of all of the members of the said Railway Employees' Department of the said American Federation of Labor; [etc.]<sup>1</sup>, and each of you, and each and all of your officers, attorneys, servants, agents, associates, members, employees and all persons acting in aid of or in conjunction with you, GREETING:

<sup>1</sup> Here follow the names of three national unions and 83 system unions and their

might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

SEC. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court. . . .

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information. . . .

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or

action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

. . . . .

Approved, October 15, 1914.

### c. Daugherty Injunction, 1922

[Issued on Sept. 1, 1922, by District Judge James H. Wilkerson, at the request of Attorney General Daugherty; renewed on several occasions and made permanent on July 12, 1923. Text in Mott, *Materials Illustrative of American Government* (Century Company), pp. 151-157.]

UNITED STATES OF AMERICA,

*Complainant,*

v.

RAILWAY EMPLOYEES' DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, Bert. M. Jewell, President, J. F. McGrath, Vice President, and John Scott, Secretary and Treasurer; International Brotherhood of Blacksmiths, Drop Forgers and Helpers, etc.,

*Defendants.*

Injunction Writ

District Court of the United States, Northern District of Illinois, Eastern Division.	}	ss.
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IN EQUITY NO. 2943

THE UNITED STATES OF AMERICA

To Railway Employees' Department of the American Federation of Labor, and Bert. M. Jewell, President, and John Scott, Secretary and Treasurer thereof, in their respective individual and official capacities and as representatives of all of the members of the said Railway Employees' Department of the said American Federation of Labor; [etc.]<sup>1</sup>, and each of you, and each and all of your officers, attorneys, servants, agents, associates, members, employees and all persons acting in aid of or in conjunction with you, GREETING:

<sup>1</sup> Here follow the names of three national unions and 83 system unions and their principal officers.

WHEREAS, It hath been represented to the Judges of our District Court of the United States for the Eastern Division of the Northern District of Illinois, in Chancery sitting, on the part of the United States of America, complainant in its certain bill of complaint, exhibited in our said District Court, on the Chancery side thereof, before the Judges of said Court, against you, the said defendants above named, and each and all of you, to be relieved touching the matters complained of. In which said bill it is stated, among other things, that you are combining and conspiring with others to interfere with, hinder, obstruct and restrain the transportation of passengers and property in interstate commerce and the carriage of the United States mail upon and over the various lines of railroad and systems of transportation of the following named railway companies in the United States of America, to wit:

Alabama & Vicksburg Railway Company,

Vicksburg, Shreveport & Pacific Railway Company.

Alton & Southern Railroad.

Ann Arbor Railroad Company. . . .<sup>2</sup>

The bill of complaint further alleges that your acts and doings in the premises are contrary to equity and good conscience.

And the court having found that in pursuance of said unlawful combination and conspiracy the said defendants above named have by picketing, acts of violence, threats, intimidations, unlawful persuasions, sabotage, injury to and destruction of property, and by other unlawful means, interfered with, hindered, obstructed and restrained interstate trade and commerce and the carriage of the United States mails upon and over the said lines of railroad and systems of transportation aforesaid; and have interfered with, obstructed, hindered and restrained interstate trade and commerce and the carriage of the United States mails thereon and thereover so as to cause great and widespread inconvenience, loss and damage and irreparable injury to the commercial, manufacturing, producing and distributing interests in the United States and to the detriment of the public interest; and unless restrained and enjoined the said defendants will continue such unlawful conduct with further great and widespread inconvenience, loss and damage and irreparable injury as aforesaid; and that the said defendants and each of them are properly before the court and that the ends of justice require that the said defendants and each of them should be temporarily restrained and enjoined as hereinafter ordered; and

<sup>2</sup> Here follow the names of more than 200 railroads and their subsidiaries.



that the United States of America is without an adequate remedy at law and that said application for a preliminary injunction should be granted.

And it being ordered that a writ of preliminary injunction issue out of said Court, upon said bill, enjoining and restraining you, and each of you, as prayed for in said bill; We, therefore, in consideration thereof, and of the particular matters in said bill set forth, do strictly command you, the said defendants above named, and each and all of you, and each and all of your officers, attorneys, servants, agents, associates, members, employees, and all persons acting in aid of or in conjunction with you, that you **DO ABSOLUTELY DESIST AND REFRAIN FROM:**

(a) In any manner interfering with, hindering or obstructing said railway companies, or any of them, their officers, agents, servants, or employees in the operation of their respective railroads and systems of transportation or the performance of their public duties and obligations in the transportation of passengers and property in interstate commerce and the carriage of the mails, and from in any manner interfering with, hindering or obstructing the officers, agents, servants or employees of said railway companies, or any of them, engaged in the construction, inspection, repair, operation or use of trains, locomotives, cars, or other equipment of said railway companies, or any of them, and from preventing or attempting to prevent any person or persons from freely entering into or continuing in the employment of said railway companies, or any of them for the construction, inspection, repair, operation or use of locomotives, cars, rolling stock or other equipment;

(b) In any manner conspiring, combining, confederating, agreeing and arranging with each other or with any other person or persons, organizations or associations to injure or interfere with or hinder said railway companies, or any of them, in the conduct of their lawful business of transportation of passengers and property in interstate commerce and the carriage of the mails; . . .

(c) Loitering or being unnecessarily in the vicinity of the points and places of ingress or egress of the employees of said railway companies, or any of them, to and from such premises in connection with their said employment, for the purpose of doing any of the things herein prohibited, or aiding, abetting, directing or encouraging any person or persons, organization, or association, by letters, telegrams, telephone, word of mouth, or otherwise, to do any of the acts heretofore described in this and

preceding paragraphs; trespassing, entering or going upon the premises of the said railway companies, or any of them, at any place or in the vicinity of any place where the employees of said companies, or any of them, are engaged in constructing, inspecting, overhauling, or repairing locomotives, cars, or other equipment, or where such employees customarily perform such duties or at any other place on the premises of said railway companies, or any of them, except where the public generally are invited to come to transact business with said railway companies as common carriers of passengers and property in interstate commerce;

(d) Inducing or attempting to induce, with intent to further said conspiracy, by the use of threats, violent or abusive language, opprobrious epithets, physical violence or threats thereof, intimidation, displays of force or numbers, jeers, entreaties, argument, persuasion, reward, or otherwise, any person or persons to abandon the employment of said railway companies, or any of them, or to refrain from entering such employment;

(e) Engaging, directing or procuring others to engage in the practice commonly known as picketing, that is to say, assembling or causing to be assembled numbers of the members of said Federated Shop Crafts, or others in sympathy with them, in the vicinity of where the employees of said railway companies, or any of them, are required to work and perform their duties, or at or near the places of ingress or egress, or along the ways traveled by said employees thereto or therefrom, and by threats, persuasion, jeers, violent or abusive language, violence or threats of violence, taunts, entreaties or argument, or by any similar acts preventing or attempting to prevent any of the employees of said railway companies, or any of them, from entering upon or continuing in their duties as such employees, or so preventing, or attempting to prevent, any other person or persons from entering or continuing in the employment of said railway companies, or any of them; and aiding, abetting, ordering, assisting, directing, or encouraging in any way any person or persons in the commission of any of said acts;

(f) Congregating or maintaining, or directing, aiding, or encouraging the congregating or maintaining upon, at or near any of the yards, shops, depots, terminals, tracks, waylands, roadbeds, or premises of said railway companies, or any of them, of any guards, pickets, or persons to perform any act of guarding, picketing, or patrolling any such yards, shops, depots, terminals or other premises of said railway companies, or any of them;

...

(g) Doing or causing, or in any manner conspiring, combining, directing, commanding, or encouraging the doing or causing the doing by any person or persons of any injury or bodily harm to any of the servants, agents or employees of said railway companies, or any of them; going singly or collectively to the home, abode, or place of residence of any employee of the said railway companies, or any of them, for the purpose of intimidating, threatening, or coercing such employee or member of his family, or in any manner by violence or threats of violence, intimidation, opprobrious epithets, persuasion, or other acts of like character, directed towards any said employee or member of his family, for the purpose of inducing or attempting to induce such employee to refuse to perform his duties as an employee of said railway companies, or any of them; or so attempting to prevent any person or persons from entering the employ of any of said railway companies, or aiding, encouraging, directing, commanding or causing any person or persons so to do;

(h) In any manner directly or indirectly hindering, obstructing, or impeding the operation of any train or trains of said railway companies, or any of them, in the movement and transportation of passengers and property in interstate commerce or in the carriage of the United States mails, or in the performance of any other duty as common carriers. . . .

(i) In any manner, with intent to further said conspiracy by letters, printed or other circulars, telegrams, telephones, word of mouth, oral persuasion or communication, or through interviews published in newspapers, or other similar acts, encouraging, directing or commanding any person, whether a member of any or either of said labor organizations or associations defendant herein, to abandon the employment of said railway companies, or any of them, or to refrain from entering the service of said railway companies, or any of them;

(2) That you the said defendants, Bert M. Jewell, John Scott, . . . and each of you, as officers as aforesaid and as individuals, do absolutely desist and refrain from—

(a) Issuing any instructions, or making any requests, public statements or communications heretofore enjoined and restrained in this writ to any defendant herein, or to any officer or member of any said labor organizations constituting the said Federated Shop Crafts, or to any officer or member of any system federation thereof. . . .

(b) Using, or causing to be used, or consenting to the use of any of the funds or moneys of said labor organizations in aid of

or to promote or encourage the doing of any of the matters or things hereinbefore restrained and enjoined;

Until this Honorable Court, in Chancery sitting, shall make other order to the contrary. Hereof fail not, under the penalty of what the law directs.

But nothing herein contained shall be construed to prohibit the use of funds or moneys of any of said labor organizations for any lawful purpose, and nothing contained in this order shall be construed to prohibit the expression of an opinion or argument not intended to aid or encourage the doing of any of the acts hereinbefore enjoined, or not calculated to maintain or prolong a conspiracy to restrain interstate commerce or the transportation of the mails.

To all Marshals of the United States to whom this writ may come to execute and return in due form of law.

WITNESS, the Honorable James H. Wilkerson, Judge of the District Court of the United States for the Northern District of Illinois, at Chicago, in said District, this 25th day of September, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the United States of America the 147th year.

JOHN H. R. JAMAR,  
*Clerk.*

Seal of  
Dist. Court  
U. S. Northern  
Dist. Illinois  
1855

### 73. AMOUNT OF JUDICIAL BUSINESS

The amount of litigation carried to the federal courts is tremendous. The number of cases decided by the Supreme Court alone from 1789 to 1925 is estimated as somewhat over 30,000, published in 268 volumes. The following tables indicate graphically the number and character of the cases heard and decided in the federal courts.

## a. Comparative Analysis of Supreme Court Business

[Frankfurter & Landis, *The Business of the Supreme Court* (The Macmillan Company), p. 302. First published in Harvard Law Review, vol. 40, p. 1113 (June, 1927).]

COMPARATIVE ANALYSIS OF SUPREME COURT BUSINESS  
1825, 1875, 1925

	1825 Term	1875 Term	1925 Term
Admiralty .....	2	5	8
Anti-trust Legislation .....	0	0	2
Bankruptcy .....	0	13	9
Bill of Rights (other than Due Process) .....	0	2	3
Commerce Clause			
1. Constitutionality of Federal Regulation ..	0	0	2
2. Constitutionality of State Regulation ...	0	2	2
3. Construction of Federal Legislation .....	0	0	29
Common Law Topics .....	10	81	11
Construction of Miscellaneous Statutes			
1. Federal .....	2	14	15
2. State .....	2	2	0
Due Process			
1. Regulation of Economic Enterprise .....	0	0	20
2. Relating to Procedure .....	0	2	3
Impairment of Contract .....	0	1	4
Indians .....	0	0	7
International Law, War and Peace .....	2	5	6
Jurisdiction, Practice and Procedure			
1. Supreme Court .....	0	19	9
2. Inferior Courts .....	4	11	20
Land Legislation .....	0	11	3
Patents and Trademarks .....	1	8	4
Slave Trade .....	3	0	0
Suits against Government in Contract .....	0	12	17
Suits by States .....	0	0	8
Taxation			
1. Federal .....	0	2	19
2. State .....	0	3	8
Totals .....	26	193	209

## b. Summary of Business Before Federal Courts, 1925

[Report of Attorney General, 1926, p. 124.]

## (A) SUPREME COURT OF THE UNITED STATES

Number of cases pending at beginning of year.....	555
Number of cases docketed during the year.....	754
Number of cases disposed of during the year.....	858
Number of cases pending at the close of the year.....	451

## (B) UNITED STATES COURT OF CUSTOMS APPEALS

Number of cases pending at beginning of year.....	134
Number of cases docketed during the year.....	155
Number of cases disposed of during the year.....	239
Number of cases pending at the close of the year.....	50

## (C) COURT OF CLAIMS

Number of cases pending at beginning of year.....	2,941
Number of cases docketed during the year.....	440
Number of cases disposed of during the year.....	1,348
Number of cases pending at the close of the year.....	2,033

## (D) COURTS OF APPEALS

Number of cases pending at beginning of year.....	1,386
Number of cases docketed during the year.....	2,588
Number of cases disposed of during the year.....	2,558
Number of cases pending at the close of the year.....	<u>1,416</u>

## (E) DISTRICT COURTS

Number of cases and other proceedings commenced during the year:

Civil cases to which the United States was a party.....	17,504
Criminal prosecutions by the United States.....	68,582
Admiralty cases (United States not a party) .....	2,830
Other suits to which the United States was not a party...	18,387
Bankruptcy proceedings .....	46,374

Total ..... 153,677

Number of cases and other proceedings terminated during the year:

Civil cases to which the United States was a party.....	17,236
Criminal prosecutions by the United States.....	76,536
Admiralty cases (United States not a party) .....	2,786
Other suits to which the United States was not a party....	18,701
Bankruptcy proceedings .....	47,307

Total ..... 162,566

Number of cases and other proceedings pending at the close of the year:

Civil cases to which the United States was a party.....	18,455
Criminal prosecutions by the United States.....	38,858
Admiralty cases .....	8,656
Other suits to which the United States was not a party....	29,712
Bankruptcy proceedings .....	58,917
Total .....	<u>154,598</u>

#### 74. DOCTRINE OF JUDICIAL REVIEW: MARBURY V. MADISON

Perhaps the most important power possessed by the courts is that of passing upon the constitutionality of legislation, commonly called the power of judicial review. This power is not specifically granted by the Constitution, but was asserted by the Supreme Court in the case of *Marbury v. Madison*, and has been since accepted as belonging to the courts. The case arose out of the so-called "midnight appointments" of President Adams, among which was the appointment of William Marbury to be justice of the peace in the District of Columbia. His commission had been duly signed and sealed, but had not been delivered when Adams' term expired and Jefferson became president. Madison, as Jefferson's Secretary of State, refused to deliver the commission to Marbury, who thereupon brought suit in the Supreme Court for a writ of mandamus to compel such delivery. The Supreme Court held that the section of the Judiciary Act of 1789 which authorized the issuance of writs of mandamus by that Court was unconstitutional, and that although Marbury was entitled to his commission its delivery could not be compelled. Although the suit involved an insignificant office, Chief Justice Marshall took occasion to expound at some length the doctrine of judicial review, and it is for this the case is noted.

[*Marbury v. Madison* (1803), 1 Cranch 137, 176-179; 2 L. Ed. 60, 73-74.]

On the 24th February, the following opinion was delivered by the Chief Justice.

##### *Opinion of the Court. . .*

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize cer-

tain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution,



and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written consti-

tution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the Constitution, and only see the law?

The Constitution declares "that no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve?

"No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to

their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as—, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument. The rule must be discharged.

## 75. THE COURTS AND SOCIAL POLICY

It is well recognized as a cardinal principle of the American system that policies should be fixed by the legislative body, leaving to the courts the determination of strictly legal questions. In the course of their exercise of judicial review, however, the courts appear on occasion to pass upon the wisdom or expediency of legislation, as well as upon its legality. Conspicuous examples are the Income Tax Case of 1895, in which the Supreme Court, after reversing itself, denied the constitutionality of the income tax; and the Minimum Wage Cases of 1923, in which the majority opinion was severely criticized by Chief Justice Taft.

## a. Income Tax Cases

[*Pollock v. Farmers' Loan and Trust Co.* (1895), 157 U. S. 429, 607, 695; 39 L. Ed. 759, 828, 1145-1146.]

Mr. Justice Field's concurring opinion [at first hearing]:

Here I close my opinion. I could not say less in view of questions of such gravity that go down to the very foundation of the government. If the provisions of the Constitution can be set aside by an Act of Congress, where is the course of usurpation to end? The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness. "If the court sanctions the power of discriminating taxation, and nullifies the uniformity mandate of the Constitution," as said by one who has been all his life a student of our institutions, "it will mark the hour when the sure decadence of our present government will commence." If the purely arbitrary limitation of \$4000 in the present law can be sustained, none having less than that amount of income being assessed or taxed for the support of the government, the limitation of future Congresses may be fixed at a much larger sum, at five or ten or twenty thousand dollars, parties possessing an income of that amount alone being bound to bear the burdens of government; or the limitation may be designated at such an amount as a board of "walking delegates" may deem necessary. There is no safety in allowing the limitation to be adjusted except in strict compliance with the mandates of the Constitution which require its taxation, if imposed by direct taxes, to be apportioned among the states according to their representation, and if imposed by indirect taxes, to be uniform in operation and, so far as practicable, in proportion to their property, equal upon all citizens. Unless the rule of the Constitution governs, a majority may fix the limitation at such rate as will not include any of their own number.

Mr. Justice Brown dissenting [at second hearing]: . . .

It is difficult to overestimate the importance of these cases. I certainly cannot overstate the regret I feel at the disposition made of them by the court. It is never a light thing to set aside the deliberate will of the legislature, and in my opinion it should

never be done, except upon the clearest proof of its conflict with the fundamental law. Respect for the Constitution will not be inspired by a narrow and technical construction which shall limit or impair the necessary powers of Congress. Did the reversal of these cases involve merely the striking down of the inequitable features of this law, or even the whole law, for its want of uniformity, the consequences would be less serious; but as it implies a declaration that every income tax must be laid according to the rule of apportionment, the decision involves nothing less than a surrender of the taxing power to the moneyed class. By resuscitating an argument that was exploded in the *Hylton* case, and has lain practically dormant for a hundred years, it is made to do duty in nullifying, not this law alone, but every similar law that is not based upon an impossible theory of apportionment. Even the spectre of socialism is conjured up to frighten Congress from laying taxes upon the people in proportion to their ability to pay them. It is certainly a strange commentary upon the Constitution of the United States and upon the democratic government that Congress has no power to lay a tax which is one of the main sources of revenue of nearly every civilized state. It is a confession of feebleness in which I find myself wholly unable to join.

While I have no doubt that Congress will find some means of surmounting the present crisis, my fear is that in some moment of national peril this decision will rise up to frustrate its will and paralyze its arm. I hope it may not prove the first step toward the submergence of the liberties of people in a sordid despotism of wealth.

As I cannot escape the conviction that the decision of the court in this great case is fraught with immeasurable danger to the future of the country, and that it approaches the proportion of a national calamity, I feel it my duty to enter my protest against it.

#### b. Minimum Wage Cases

[*Adkins v. Children's Hospital* (1923), 261 U. S. 525, 562; 67 L. Ed. 785, 798.]

Mr. Chief Justice Taft, dissenting:

I regret much to differ from the court in these cases.

The boundary of the police power, beyond which its exercise becomes an invasion of the guaranty of liberty under the 5th and

14th Amendments to the Constitution, is not easy to mark. Our court has been laboriously engaged in pricking out a line in successive cases. We must be careful, it seems to me, to follow that line as well as we can, and not to depart from it by suggesting a distinction that is formal rather than real.

Legislatures, in limiting freedom of contract between employee and employer by a minimum wage, proceed on the assumption that employees in the class receiving least pay are not upon a full level of equality of choice with their employer, and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweating system and of the long hours and low wages which are characteristic of it are well known. Now, I agree that it is a disputable question in the field of political economy how far a statutory requirement of maximum hours or minimum wages may be a useful remedy for these evils, and whether it may not make the case of the oppressed employee worse than it was before. But it is not the function of this court to hold congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound. . . .

### c. View of President Roosevelt

[Message to Congress, Dec. 8, 1908. *Foreign Relations of the United States, 1908*, pp. XXVI-XXVII.]

. . . . .

The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the produce of primitive economic conditions. Of course a judge's views on progressive social philosophy are entirely second in importance to his possession of a high and fine character; which means the possession of such elementary virtues as honesty,

courage, and fairmindedness. The judge who owes his election to pandering to demagogic sentiments or class hatreds and prejudices, and the judge who owes either his election or his appointment to the money or the favor of a great corporation, are alike unworthy to sit on the bench, are alike traitors to the people; and no profundity of legal learning, or correctness of abstract conviction on questions of public policy, can serve as an offset to such shortcomings. But it is also true that judges, like executives and legislators, should hold sound views on the questions of public policy which are of vital interest to the people.

The legislators and executives are chosen to represent the people in enacting and administering the laws. The judges are not chosen to represent the people in this sense. Their function is to interpret the laws. The legislators are responsible for the laws; the judges for the spirit in which they interpret and enforce the laws. We stand aloof from the reckless agitators who would make the judges mere pliant tools of popular prejudice and passion; and we stand aloof from those equally unwise partisans of reaction and privilege who deny the proposition that, inasmuch as judges are chosen to serve the interests of the whole people, they should strive to find out what those interests are, and, so far as they conscientiously can, should strive to give effect to popular conviction when deliberately and duly expressed by the lawmaking body. The courts are to be highly commended and staunchly upheld when they set their faces against wrongdoing or tyranny by a majority; but they are to be blamed when they fail to recognize under a government like ours the deliberate judgment of the majority as to a matter of legitimate policy, when duly expressed by the legislature. Such lawfully expressed and deliberate judgment should be given effect by the courts, save in the extreme and exceptional cases where there has been a clear violation of a constitutional provision. Anything like frivolity or wantonness in upsetting such clearly taken governmental action is a grave offense against the Republic. To protest against tyranny, to protect minorities from oppression, to nullify an act committed in a spasm of popular fury, is to render a service to the Republic. But for the courts to arrogate to themselves functions which properly belong to the legislative bodies is all wrong, and in the end works mischief. The people should not be permitted to pardon evil and slipshod legislation on the theory that the court will set it right; they should be taught that the right way to get rid of a bad law is to have the legislature repeal it, and not to have the courts by ingenious hair-

splitting nullify it. A law may be unwise and improper; but it should not for these reasons be declared unconstitutional by a strained interpretation, for the result of such action is to take away from the people at large their sense of responsibility and ultimately to destroy their capacity for orderly self restraint and self government. Under such a popular government as ours, founded on the theory that in the long run the will of the people is supreme, the ultimate safety of the Nation can only rest in training and guiding the people so that what they will shall be right, and not in devising means to defeat their will by the technicalities of strained construction.

## 76. PROPOSALS FOR MODIFICATION OF JUDICIAL REVIEW

The extraordinary character of the power vested in the courts through the review of legislation has led many to believe, as a matter of principle, that there should be some limitations imposed. In addition, there has on several occasions been serious dissatisfaction with particular decisions and with the manner in which the power has been exercised. Consequently, proposals have been made from time to time for a limitation or modification of judicial review. Several of these proposals have received serious consideration in Congress, some have passed one house, and in 1868 Congress actually enacted a law depriving the Supreme Court of jurisdiction to hear cases arising under the earlier Reconstruction Act, in order to prevent that act from being declared unconstitutional. Typical of these earlier proposals are the more recent ones by President Roosevelt and by Senators Borah and LaFollette, which, although they have not been adopted, represent the forms of modification suggested by the various groups who oppose the unlimited exercise of power by the courts.

### a. Recall of Judicial Decisions

[Progressive Party Platform, 1912. Text in Porter, *National Party Platforms* (The Macmillan Company), p. 337.]

## THE COURTS

The Progressive party demands such restriction of the power of the courts as shall leave to the people the ultimate authority to determine fundamental questions of social welfare and public policy. To secure this end, it pledges itself to provide:

1. That when an Act, passed under the police power of the State, is held unconstitutional under the State Constitution, by the courts, the people, after an ample interval for deliberation, shall have an opportunity to vote on the question whether they desire the Act to become law, notwithstanding such decision.



2. That every decision of the highest appellate court of a State declaring an Act of the Legislature unconstitutional on the ground of its violation of the Federal Constitution shall be subject to the same review by the Supreme Court of the United States as is now accorded to decisions sustaining such legislation.

### b. LaFollette Proposal

[Platform of Progressive Party, 1924. Text in Porter, *National Party Platforms* (The Macmillan Company), p. 519.]

. . . . .

5. We favor submitting to the people, for their considerate judgment, a constitutional amendment providing that Congress may by enacting a statute make it effective over a judicial veto.

We favor such amendment to the constitution as may be necessary to provide for the election of all Federal Judges, without party designation, for fixed terms not exceeding ten years, by direct vote of the people.

### c. Borah Proposal

[S. 4483, 67 Cong., 4 Sess.; introduced by Senator Borah, Feb. 5, 1923. Text in *Congressional Digest*, vol. II, p. 271.]

A bill providing the number of Judges which shall concur in holding an Act of Congress unconstitutional.

That in all suits now pending, or which may hereafter be pending, in the Supreme Court of the United States, except cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, where is drawn in question an Act of Congress on the ground of repugnancy to the Constitution of the United States, at least seven members of the court shall concur before pronouncing said law unconstitutional.

## CHAPTER XII

### TAXATION AND FINANCE

#### 77. POWER TO TAX STATE INSTRUMENTALITIES

In the famous case of *McCulloch v. Maryland*, Chief Justice Marshall laid down the principle that "the power to tax is the power to destroy." From that and the indestructible character of the Union, he drew the implication that states had no power to tax federal agencies or instrumentalities—in that case the notes of the United States Bank. The converse doctrine that the federal government similarly lacks the power to tax instrumentalities of a state was not positively asserted by the courts until 1870, but has ever since been maintained, even in the face of the language of the 16th Amendment. The result of this doctrine has been a tremendous increase of investments in state and municipal bonds, these being free from the federal income tax, hence an amendment to the Constitution was proposed in 1924 by the House Ways and Means Committee and approved by President Harding, specifically giving such power of taxation. In connection with the consideration of this proposal, Mr. A. W. Gregg, an expert in the Treasury Department, wrote such an excellent review of the pertinent decisions, that his letter is reproduced here in part.

[Letter of A. W. Gregg to Representative W. R. Green, Jan. 4, 1924. Text in *Congressional Record*, vol. 65, pt. 8, pp. 8204-8206.]

Treasury Department,  
Jan. 4, 1924.

Hon. W. R. Green,  
Chairman, Ways and Means Committee  
House of Representatives.

My dear Mr. Chairman:

Prior to its adjournment before the holidays, the committee requested that I prepare for the assistance of the committee a digest of the decisions and arguments affecting the question of whether Congress has the power to levy a tax upon the income from securities issued by States or political subdivisions thereof. In accordance with that request the following is submitted.

Two questions will be considered: (1) Whether the Federal Government has the general power to lay a tax upon income derived from securities issued by States or political subdivisions thereof; (2) in the event that Congress may not lay a tax upon income from all such securities, whether the income from obligations issued by States or political subdivisions thereof may be taxed by the Federal Government.

The earliest decision of the Supreme Court upon the question of the power of the United States to tax State instrumentalities is the *Collector v. Day* (1870) (11 Wall. 113). Under the Civil War income tax acts, a tax was assessed on the salary of Day, a probate judge in Massachusetts. He paid the tax under protest and brought action to recover it. It was held by the Supreme Court that Congress had no power to impose a tax upon the salary of a State judicial officer.

The Court cited *Dobbins v. Commissioners* (1842) (16 Peters 435); *McCullough v. Maryland* (1819) (4 Wheaton 316), and *Weston v. Charleston* (1829) (2d Peters 449) as establishing the proposition that the State governments cannot lay a tax upon the constitutional means employed by the Government of the Union to execute its constitutional powers, and concluded that on the same principle, the United States cannot tax the means and instrumentalities employed by the States for carrying on their governmental operations.

The Court's reasoning is indicated in the following passage (pp. 126, 187):

"It is admitted that there is no express provision in the Constitution that prohibits the general Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that Government. In both cases the exemption rests upon necessary implication and is upheld by the great law of self preservation; as any Government, whose means employed in conducting its operations, if subject to the control of another and distinct Government, can exist only at the mercy of that Government.

"The means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government."

This decision was followed in the cases of a Judge of the Superior Court of New York City (*Freedman v. Sigel*, 1875, Federal case 5989) and of a State's attorney in Maryland (*United States v. Ritchie*, 1872, Federal case 16168).

In the case of *Pollock v. Farmer's Loan and Trust Company* (1895, 157 U. S. 429), a bill by a shareholder to enjoin the defendant corporation from paying an income tax under the Act of Aug. 15, 1894 (28 Stat. 309), it was urged that the act was

unconstitutional on the grounds: (1) That in imposing a tax on the income or rents of real and personal property it imposed a direct tax upon the property itself, which was void, because not apportioned among the States; (2) that in imposing indirect taxes it violated the constitutional requirements of uniformity; (3) that in imposing a tax upon income received from State and municipal bonds it exceeded the constitutional powers of the Federal Government.

With reference to this third point Chief Justice Fuller said (p. 585):

"It is contended that although the property or revenues of the States or their instrumentalities cannot be taxed, nevertheless the income derived from State, county and municipal securities can be taxed, but we think the same want of power to tax the property or revenues of the States or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason, and that reason is given by Chief Justice Marshall in *Weston v. Charleston* (2 Pet. 449, 468) where he said: 'The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct Government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely. . . . The tax on Government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution.'

"Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution."

It is clear, therefore, that prior to the addition of the Sixteenth Amendment Congress had no power to levy a tax, directly or indirectly, upon securities issued by States or a political subdivision thereof. There remains to be considered the effect of the sixteenth amendment.

The sixteenth amendment provides that 'the Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.'

At the time the sixteenth amendment was being considered by the legislatures of the several States it was urged by various writers and public men that the proposed amendment gave Congress the power to tax the salaries of officers and employees of the States and the income from State and municipal securities. See Foster, "Income Tax," page 78 et seq.; Minor, "The Proposed Income Tax Amendment," 15 Va. Legal Reg. 737, 753; Hubbard, "The Sixteenth Amendment," 33 Harvard Law Review, 794. The contrary view was urged with equal strength. See Congressional Record, volume 45, pages 1694-1699, 2245-2247, 2539-2540, and Ritchie, "Power of Congress to Tax State Securities," 5 American Bar Association Journal, 602.

In the first case which arose under the Sixteenth Amendment, the case of *Brushaber v. Union Pacific Railroad Co.* (240 U. S.), the Supreme Court committed itself on the question of whether or not the sixteenth amendment gave to Congress any new power of taxation. This case was a suit by a stockholder to restrain the defendant corporation from paying an income tax imposed by the tariff act of 1913, on the ground that it was unconstitutional. Chief Justice White, in the course of upholding the validity of the act, said (pp. 17, 18, 19):

"It is clear on the face of this text that it (the amendment) does not purport to confer power to levy income taxes in a general sense—an authority already possessed and never questioned—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived."

Indeed, in the light of the history which we have given and of the decision in the *Pollock* case and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock* case was decided; that is, of determining whether a tax on income was direct, not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment.

Indeed, from another point of view, the amendment demonstrates that no such purpose was intended and, on the contrary,

shows that it was drawn with the object of maintaining the limitations of the Constitution and harmonizing their operation. . . . The purpose was not to change the existing interpretation except to the extent necessary to accomplish the result intended; that is, the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself and thereby to take the income tax out of the class of excises, duties and imposts and place it in the class of direct taxes. . . .

The opinion in *Evans v. Gore* (1920, 253 U. S. 245) throws a more direct light upon the views of the Supreme Court regarding the scope of the sixteenth amendment. The action therein was brought by a United States district judge, appointed in 1899, to recover a tax paid upon his salary under the revenue act of 1918 (40 Stat. 1062). His chief contention was that the effect of the act in imposing a tax on his salary was to diminish his compensation, and that to this extent it was repugnant to the third article of the Constitution, providing that his salary should not be diminished during his continuance in office.

The court came to the conclusion that the prohibition prevented diminution by taxation, and the court, after reciting the history of the adoption of the sixteenth amendment, concluded:

"True, Governor Hughes of New York, in a message laying the amendment before the legislature of that State for ratification or rejection, expressed some apprehension lest it might be construed as extending the taxing power to income not taxable before; but his message promptly brought forth from statesmen who participated in proposing the amendment such convincing expositions of its purpose, as here stated, that the apprehension was effectively dispelled and ratification followed.

"Thus the genesis and words of the amendment unite in showing that it does not extend the taxing power to new or excepted subjects, but merely removes all occasion otherwise existing for an apportionment among the States of taxes laid on income, whether derived from one source or another. And we have so held in other cases."

In conclusion, then, it is evident that, since the ratification of the Sixteenth Amendment, the Supreme Court of the United States, in dicta and decision, has consistently adhered to the view that the amendment does not extend the taxing power of Congress to new or excepted subjects.

Prior to the adoption of the sixteenth amendment it was established that, in general, income from State and municipal bonds

was exempt from taxation by the Federal Government. In view of these two lines of decisions it appears evident to me that, in the absence of a constitutional amendment, a tax upon the income derived from State and municipal securities would be held by the Supreme Court to be beyond the constitutional powers of Congress.

There remains for further consideration the question of whether this exemption of the income from State and municipal securities applies to all such securities or only those issued in the course of the governmental operations of the State or municipality.

As was stated by the court in the leading case of *Collector v. Day* supra, there is no express prohibition against taxation by the Federal Government of the activities of the States; accordingly, any exemption from Federal taxation must be grounded on the necessary implications from the Constitution. The court in that case granted this exemption from taxation to the "means and instrumentalities employed for carrying on the operations of their Governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution."

What are these "means and instrumentalities" which cannot be burdened with a tax? Are all activities in which a State or municipality may choose to engage ipso facto removed from the sphere of Federal taxation?

The Supreme Court has followed a consistent policy in the series of cases involving this question, which will be indicated by extracts from the decisions. In *Bank of United States v. Planters' Bank of Georgia* (1824) (9 Wheat. 904) Chief Justice Marshall said (p. 907):

"It is, we think, a sound principle that when a Government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to a company its privileges and prerogation, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."

This distinction between the so-called proprietary functions of a municipality or State and its governmental functions has been further brought out in a series of cases involving Federal taxation. In *Salt Lake City v. Hollister* (1865) (118 U. S. 296) ac-

tion was brought by the city to recover taxes paid the Federal collector of internal revenue on spirits distilled by the city.

It was held that a municipal corporation engaged in a business of distilling spirits was subject to internal revenue taxation under the laws of the United States. In the leading case upon the subject—*South Carolina v. U. S.* (1905) (199 U. S. 437) Justice Brewer brings out clearly the distinction noted in the earlier cases between proprietary and governmental functions of a State. The facts were these:

The State of South Carolina established dispensaries for the wholesale and retail sale of liquor, and prohibited sales by others. The United States demanded license taxes from the dealers, which the State paid. The dispensers had no interest in the sales and received no profits thereon. Later the State protested against the payment of the Federal license taxes, and sued to recover amounts already paid.

In upholding the power of the United States to levy the license tax, Justice Brewer, after citing *Collector v. Day* supra, and *McCulloch v. Maryland* (1819) (4 Wheat. 316) said (pp. 456, 457, 459):

“There is something of a conflict between the full power of the Nation with respect to taxation and the exemption of the State from Federal taxation in respect to its property and a discharge of all its functions. The exemption of the State’s property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the State in all its efficiency.

“In order to determine to what extent that implication will go, we must turn to the condition of things at the time the Constitution was framed. Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers, in granting full power over license taxes to the National Government, meant that that power should be complete, and never thought that the State by extending their functions could practically destroy it. . . .”

In view of these decisions it must be regarded as established that there is a consistently recognized distinction between the strictly governmental functions of a State or municipality on the one hand and its proprietary or private activities on the other; and, further, that the implied exemption from Federal taxation applies only to the former and does not apply to the latter.

It should be noted, however, that the line between the governmental activities and the private activities of the States and the



political subdivisions thereof has not been definitely drawn. In view of the gradual extensions of States and municipalities into many fields formerly regarded as private or proprietary, it would be most difficult, if not impossible, prior to a decision on each point by the Supreme Court, to segregate the governmental activities of a State or municipality from its private or proprietary activities. . . .

Respectfully,

A. W. GREGG

## 78. RELATION BETWEEN TAXING POWER AND POLICE POWER

One of the most important governmental powers is the so-called police power, commonly defined as the power to protect public health, safety, morals, and general welfare. Under our constitutional system, this police power is vested in the states and not in the national government. However, Congress has on numerous occasions used its taxing power in such a way as to regulate or even to destroy practices and businesses thought to be undesirable. For example, Congress, by imposing a tax of two cents a hundred on white phosphorus matches, completely destroyed the white phosphorus match industry and thus protected workmen against a deadly disease. Similarly, by a tax of ten cents a pound on colored oleomargarine, Congress prevented manufacturers from selling such oleomargarine as butter, and thus protected the public against fraud. These measures and others of the same sort were upheld by the courts as a proper exercise of the taxing power. In 1919, after an attempt to suppress child labor through the commerce power had failed, Congress passed an act imposing a tax of ten per cent on the net profits of firms or corporations employing children below the ages of fourteen to sixteen years. It was hoped in that way to discourage such employment of children, but now the Supreme Court, in spite of its previous rulings, held that this act was merely an attempt to regulate matters within the jurisdiction of the states and was therefore unconstitutional. The use of the taxing power for police purposes was therefore seriously checked.

### a. Oleomargarine Case

[*McCray v. United States* (1904), 195 U. S. 27, 53-56; 49 L. Ed. 78, 94-99.]

Mr. Justice White . . . delivered the opinion of the court:  
. . .

Whilst, as a result of our written Constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that

instrument, no instance is afforded from the foundation of the government where an act which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that, in our constitutional system, the judiciary was not only charged with the duty of upholding the Constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial, and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation.

It is, however, argued, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.

The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. . . .

The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. As we have previously said: from the beginning no case can be found announcing such a doctrine, and, on the contrary, the doctrine of a number of cases is inconsistent with its existence. As quite

recently pointed out by this court in *Knowlton v. Moore*, 178 U. S. 41, 60, 44 L. ed. 969, 977, 20 Sup. Ct. Rep. 747, the often quoted statement of Chief Justice Marshall in *M'Culloch v. Maryland* [4 Wheat. 316, 4 L. ed. 579], that the power to tax is the power to destroy, affords no support whatever to the proposition that where there is a lawful power to impose a tax its imposition may be treated as without the power because of the destructive effect of the exertion of the authority. . . .

Lastly we come to consider the argument that, even though as a general rule a tax of the nature of the one in question would be within the power of Congress, in this case the tax should be held not to be within such power, because of its effect. This is based on the contention that, as the tax is so large as to destroy the business of manufacturing oleomargarine artificially colored to look like butter, it thus deprives the manufacturers of that article of their freedom to engage in a lawful pursuit, and hence, irrespective of the distribution of powers made by the Constitution, the taxing laws are void, because they violate those fundamental rights which it is the duty of every free government to safeguard, and which, therefore, should be held to be embraced by implied, though none the less potential, guaranties, or, in any event to be within the protection of the due process clause of the 5th Amendment.

Let us concede, for the sake of argument only, the premise of fact upon which the proposition is based. Moreover, concede, for the sake of argument only, that even although a particular exertion of power by Congress was not restrained by any express limitation of the Constitution, if, by the perverted exercise of such power, so great an abuse was manifested as to destroy fundamental rights which no free government could consistently violate, that it would be the duty of the judiciary to hold such acts to be void upon the assumption that the Constitution, by necessary implication, forbade them.

Such concession, however, is not controlling in this case. This follows when the nature of oleomargarine, artificially colored to look like butter, is recalled. As we have said, it has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the states may, in the exertion of their police powers, without violating the due process clause of the 14th Amendment, absolutely prohibit the manufacture of the article. It hence results, that, even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine,

it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the 5th Amendment. That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where, to the judicial mind, it seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress.

Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated; that is, that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.

[Chief Justice Fuller, and Justices Brown and Peckham dissented.]

#### b. Child Labor Tax Case

[*Bailey v. Drexel Furniture Co.* (1922), 259 U. S. 20, 36-38; 66 L. Ed. 817, 819-820.]

Mr. Chief Justice Taft delivered the opinion of the court: . . .

The law is attacked on the ground that it is a regulation of the employment of child labor in the states,—an exclusively state function under the Federal Constitution and within the reser-

variations of the 10th Amendment. It is defended on the ground that it is a mere excise tax, levied by the Congress of the United States under its broad power of taxation conferred by §8, article 1, of the Federal Constitution. We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted, under previous decisions of this court, to infer, solely from its heavy burden, that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than sixteen years; in mills and factories, children of an age greater than fourteen years; and shall prevent children of less than sixteen years in mills and factories from working more than eight hours a day or six days in the week. If an employer departs from the prescribed course of business, he is to pay to the government one tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scienters are associated with penalties, not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates, whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

It is the high duty and function of this court in cases regularly

brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for nearly a century and a half.

Out of a proper respect for the acts of a co-ordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject. But in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the 10th Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states.

The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial; but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them, and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a

mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment, or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing, and imposing its principal consequence on those who transgress its standard. . . .

Mr. Justice Clarke dissents.

## 79. THE BUDGET SYSTEM

Until 1921, the finances of the national government were conducted in a somewhat haphazard manner, without any appreciable coordination between income and expenditure, and without any clear responsibility for the efficient and economical operation of all the government services. The adoption of a budget system had been proposed for some time, and in 1920 a budget bill was passed by Congress. President Wilson, although a life-long advocate of the budget system, vetoed this bill on constitutional grounds, and the installation of such a system was therefore postponed until 1921, when Congress passed and President Harding approved, the so-called Budget and Accounting Act. Under the vigorous administration of General Dawes, who became the first Director of the Budget, economies were immediately effected and the budget system established on a firm basis.

[Budget and Accounting Act of 1921. *U. S. Statutes at Large*, vol. 42, pp. 20-27.]

CHAP. 18.—An Act to provide a national budget system and an independent audit of Government accounts, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### TITLE I. DEFINITIONS

SECTION 1. This act may be cited as the "budget and accounting act, 1921."

SEC. 2. When used in this act—

The terms "department and establishment" and "department or establishment" mean any executive department, independent commission, board, bureau, office, agency, or other establishment of the Government, including the municipal government of the District of Columbia, but do not include the legislative branch of the Government or the Supreme Court of the United States;

. . .

## TITLE II. THE BUDGET

SEC. 201. The President shall transmit to Congress on the first day of each regular session the budget, which shall set forth in summary and in detail:

(a) Estimates of the expenditures and appropriations necessary, in his judgment, for the support of the Government for the ensuing fiscal year; except that the estimates for such year for the legislative branch of the Government and the Supreme Court of the United States shall be transmitted to the President on or before October 15 of each year, and shall be included by him in the budget without revision;

(b) His estimates of the receipts of the Government during the ensuing fiscal year, under (1) laws existing at the time the budget is transmitted, and also (2) under the revenue proposals, if any, contained in the budget;

(c) The expenditures and receipts of the Government during the last completed fiscal year;

(d) Estimates of the expenditures and receipts of the Government during the fiscal year in progress;

(e) The amount of annual, permanent, or other appropriations, including balances of appropriations for prior fiscal years, available for expenditure during the fiscal year in progress, as of November 1 of such year;

(f) Balanced statements of (1) the condition of the Treasury at the end of the last completed fiscal year, (2) the estimated condition of the Treasury at the end of the fiscal year in progress, and (3) the estimated condition of the Treasury at the end of the ensuing fiscal year, if the financial proposals contained in the budget are adopted;

(g) All essential facts regarding the bonded and other indebtedness of the Government; and

(h) Such other financial statements and data as in his opinion are necessary or desirable in order to make known in all practicable detail the financial condition of the Government. . . .

SEC. 207. There is hereby created in the Treasury Department a bureau to be known as the bureau of the budget. There shall be in the bureau a director and an assistant director, who shall be appointed by the President and receive salaries of \$10,000 and \$7,500 a year, respectively. . . . The bureau, under such rules and regulations as the President may prescribe, shall prepare for him the budget, the alternative budget, and any supplemental or deficiency estimates, and to this end shall have



authority to assemble, correlate, revise, reduce, or increase the estimates of the several departments or establishments. . . .

SEC. 209. The bureau, when directed by the President, shall make a detailed study of the departments and establishments for the purpose of enabling the President to determine what changes (with a view of securing greater economy and efficiency in the conduct of the public service) should be made in (1) the existing organization, activities, and methods of business of such departments or establishments, (2) the appropriations therefor, (3) the assignment of particular activities to particular services, or (4) the regrouping of services. The results of such study shall be embodied in a report or reports to the President, who may transmit to Congress such report or reports or any part thereof with his recommendations on the matters covered thereby.

. . .

SEC. 213. Under such regulations as the President may prescribe, (1) every department and establishment shall furnish to the bureau such information as the bureau may from time to time require, and (2) the director and the assistant director or any employee of the bureau when duly authorized shall, for the purpose of securing such information, have access to, and the right to examine, any books, documents, papers, or records of any such department or establishment.

SEC. 214. (a) The head of each department and establishment shall designate an official thereof as budget officer therefor, who, in each year under his direction and on or before a date fixed by him, shall prepare the departmental estimates.

(b) Such budget officer shall also prepare, under the direction of the head of the department or establishment, such supplemental and deficiency estimates as may be required for its work.

SEC. 215. The head of each department and establishment shall revise the departmental estimates and submit them to the bureau on or before September 15 of each year. In case of his failure so to do the President shall cause to be prepared such estimates and data as are necessary to enable him to include in the budget estimates and statements in respect to the work of such department or establishment.

SEC. 216. The departmental estimates and any supplemental or deficiency estimates submitted to the bureau by the head of any department or establishment shall be prepared and submitted in such form, manner, and detail as the President may prescribe.

. . .

## TITLE III. GENERAL ACCOUNTING OFFICE

SEC. 301. There is created an establishment of the Government to be known as the general accounting office, which shall be independent of the executive departments and under the control and direction of the comptroller general of the United States. The offices of Comptroller of the Treasury and Assistant Comptroller of the Treasury are abolished, to take effect July 1, 1921. All other officers and employees of the office of the Comptroller of the Treasury shall become officers and employees in the general accounting office at their grades and salaries on July 1, 1921, and all books, records, documents, papers, furniture, office equipment, and other property of the office of the Comptroller of the Treasury shall become the property of the general accounting office. The comptroller general is authorized to adopt a seal for the general accounting office.

SEC. 302. There shall be in the general accounting office a comptroller general of the United States and an assistant comptroller general of the United States, who shall be appointed by the President, with the advice and consent of the Senate, and shall receive salaries of \$10,000 and \$7,500 a year, respectively.

...  
SEC. 303. Except as hereinafter provided in this section, the comptroller general and the assistant comptroller general shall hold office for 15 years. The comptroller general shall not be eligible for reappointment. The comptroller general or the assistant comptroller general may be removed at any time by joint resolution of Congress after notice and hearing, when, in the judgment of Congress, the comptroller general or assistant comptroller general has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment. Any comptroller general or assistant comptroller general removed in the manner herein provided shall be ineligible for reappointment to that office. When a comptroller general or assistant comptroller general attains the age of 70 years he shall be retired from his office.

SEC. 304. All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department, and the duties of the Division of Bookkeeping and Warrants of the office of the Secretary of the Treasury relating to keeping the personal ledger accounts of dis-

bursing and collecting officers, shall, so far as not inconsistent with this act, be vested in and imposed upon the general accounting office and be exercised without direction from any other officer. The balances certified by the comptroller general shall be final and conclusive upon the executive branch of the Government. . . .

SEC. 305. Section 236 of the revised statutes is amended to read as follows:

"Sec. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the general accounting office." . . .

SEC. 309. The comptroller general shall prescribe the forms, systems, and procedure for administrative appropriation and fund accounting in the several departments and establishments, and for the administrative examination of fiscal officers' accounts and claims against the United States. . . .

SEC. 312. (a) The comptroller general shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the general accounting office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds, as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

(b) He shall make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures. The comptroller general shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.

(c) The comptroller general shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.

(d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts

and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

(e) He shall furnish such information relating to expenditures and accounting to the bureau of the budget as it may request from time to time.

SEC. 313. All departments and establishments shall furnish to the comptroller general such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the comptroller general, or any of his assistants or employees, when duly authorized by him, shall for the purpose of securing such information have access to and the right to examine any books, documents, papers, or records of any such department or establishment. . . .

Approved, June 10, 1921.

## 80. BUDGETARY PROCEDURE IN CONGRESS

In order to make the budget system a success, certain changes in congressional procedure were deemed important. In both House and Senate there had developed a committee system, under which there was no centralized responsibility for financial legislation. Not only was there no such single responsibility for revenue and appropriations, but the different appropriation bills were in turn handled by separate committees—in the House by eight and in the Senate by five. With the passage of the budget bill in 1920, the House centered the responsibility for all appropriations in a single committee, and a similar reform was made by the Senate in 1922. Some of the considerations and implications involved in these changes are pointed out in the following selections.

### a. Reform of Committee System

[Lindsay Rogers, in *American Political Science Review*, vol. 18, pp. 84-88 (Feb., 1924).]

Mr. Madden [Chairman of the House Committee on Appropriations] announced in the House of Representatives on January 20, 1923, that the record of the House, in passing all of the eleven regular appropriation bills by that date, had surpassed the record of any previous short session of Congress for expeditious preparation in committee and passage by the House. In previous Congresses the dates on which the last annual supply bill had been considered by the House ranged from February 17 to March 2. The greater quickness was due to the fact that at the opening of the session the committee on appropriations had five bills practi-

cally ready for presentation to the House and that authority with regard to the appropriations was concentrated in the one committee. The bills received consideration in the Senate and were approved at earlier dates than has been customary. Five of the regular bills and a deficiency bill were approved in January, and on February 14 only three measures remained with differences between the House and the Senate unadjusted. This record compares most favorably with previous congresses. The budget system and the single committee in both the House and the Senate, furthermore, have reduced the evil of legislative riders on appropriation bills. "The Committee on Appropriations," Mr. Madden said, "in its work of preparing appropriations has endeavored conscientiously to adhere to the policy of refusing to consider extraneous legislation and to avoid trenching upon the jurisdiction of the committees of the House whose duty it is to frame legislation." When the legislative committees reported appropriation bills, there was, of course, the natural inclination to save time and to combine legislation and grants of money.

The change in number and scope of the appropriation bills,<sup>1</sup> which by custom originate in the House of Representatives, made it necessary for the Senate to revise its machinery for dealing with the bills after they had passed the House. The rule in the Senate (Rule 16) provided that of the regular appropriation bills which came over from the House, five should go to the committee on appropriations; the rivers and harbors bill went to the committee on commerce; the agricultural bill to the committee on agriculture and forestry; the diplomatic and consular bill to the committee on foreign relations; the army and military academy bills to the committee on military affairs; the Indian bill to the committee on Indian affairs; the naval bill to the committee on naval affairs; the pension bill to the committee on pensions; the post office bill to the committee on post offices and post roads. Under the new arrangement adopted in the House, eight bills would be sent to the Senate committee on appropriations; the agricultural, postal, army and navy bills would be dealt with by the legislative committees. It was proposed to give the committee on appropriations jurisdiction over them all, and to centralize the control as it had been already centralized in the House.

The change in the rules (S. Res. 213) encountered a good deal of opposition from senators serving on the committees which would be deprived of their powers over certain expenditures.

<sup>1</sup> For a comparison of the old and new methods with respect to the number and scope of appropriation bills, see *Congressional Record*, July 22, 1922, p. 11063.

The debate ran on for some time. It was complained that the rule was not working well in the House, and that the committees on appropriations were not competent to deal with technical subjects. For these the legislative committees which had acquired some competence would be necessary. The post office appropriation bill, it was said, "might just as well have been a piece of blank paper sent over here from the other body through the committee on appropriations of that body. It was first drawn by a subcommittee of the appropriations committee of the House, no one of whom ever served on the committee on the post office and post roads, or knew anything about the technique of that service, so that we have been compelled to take that bill from its enacting clause and go through it stage by stage and practically rewrite it."

The Senate amendment, however, proposed to meet this objection, in part, by creating a series of subcommittees of the appropriations committee to deal with the bills and to include *ad hoc* members recruited from the legislative committees. Thus, the naval bill would be considered by the appropriations subcommittee and three members of the committee on naval affairs. In this way it was thought technical advice could be secured, and the appropriation bill could be made to agree with other legislation; for under the rules both of the House and the Senate, complicated procedural situations sometimes come about when items are included for matters not previously authorized by law, and when the attempt is made to legislate by means of riders. In both cases there ought to be articulation between the appropriations committee and the legislative committee; in both cases, also, the legislative committees are anxious for fear that they will lose some of their legislative power. The Senate rule therefore proposed that "if an appropriation bill is reported to the Senate containing new or general legislation, a point of order may be made against the bill, and if the point is sustained the bill shall be recommitted to the committee on appropriations." The existing rule simply made the item subject to a point of order; the revision made the whole bill suffer the penalty and this, it was thought, would be sufficient to persuade the committee on appropriations not to encroach on the prerogatives of the legislative committees. It is provided also that one of the conferees shall be chosen from the legislative committee.

### b. Method of Making Appropriations

[Martin B. Madden, Chairman of House Committee on Appropriations, in *N. Y. Times*, June 11, 1922.]

The work of making appropriations for the conduct of the Government of the United States involves an infinite amount of work which may or may not be interesting to the reading public.

Under the Budget act, the Director of the Budget is required, on behalf of the President, to call upon the heads of departments and independent establishments of the Government for detailed statements of the activities upon which they are about to enter for the coming fiscal year, with a detailed estimate of the cost of such activities.

These statements are made by the bureau chiefs to the head of the department or independent establishment, and referred by him to the budget officer of the department, who, on behalf of the department head, revises the estimates upward or downward, as the case may be, and later they are reviewed and revised by the head of the department before submission to the Director of the Budget.

The Director of the Budget examines all parties interested in the figures submitted and makes a further detailed investigation of the needs of the activities proposed, and goes carefully into the question of cost. He has the power to revise, to eliminate or to add to the figures submitted, and after he has completed his examination, tabulation and revision he submits the report to the President, who, under the law, is required to report to Congress the full details of all Government activities and the financial needs for the ensuing year, and if the aggregate of his recommendations exceeds the anticipated revenues the law requires him to indicate how the proposed excess of expenditures over the revenues is to be met.

After the submission of the President's recommendations to Congress the whole subject is referred to the Committee on Appropriations. The committee divides the President's recommendations up into departments, and for each department prepares a bill. Each bill is prepared in detail, showing the amount requested for each activity within a department. The committee then holds hearings to ascertain the necessity for the amount requested in each case. Heads of departments and bureau chiefs are called in and required to testify in great detail as to what the activity means, why it is necessary, and whether it can be conducted for less than the amount requested. The hearings on

each bill are comprehensive. The committee compels the disclosure of every fact in connection with each proposed expenditure, and frequently finds itself in possession of facts which justify the denial of the request, and more frequently in a reduction of the amount asked for.

When the committee completes its hearings the bill is revised to bring it in harmony with the facts and reported to the House. It is referred then by the Speaker of the House to the Committee of the Whole House on the State of the Union and considered for amendment, and when this process is completed it is referred back to the House for final action.

When the House completes the bill it is sent to the Senate and referred to the Committee on Appropriations there. This committee goes over the details of the bill as passed by the House and frequently amends it upward, rarely ever downward.

When it comes back with Senate amendments each house appoints a committee of conference to reconcile the differences between the two houses. The Conference Committee generally consists of three members of each house. A majority from each house in conference is necessary to the adoption of a final adjustment of the items in difference. The conferees of the House report the conclusions of the conference to the House and those of the Senate report to the Senate, and when the bills are finally adopted by both houses they are signed by the President and thus become law.

It may be interesting to know that the expenses of the Government in 1919 were \$19,000,000,000; that they were reduced in 1920 to about \$6,150,000,000; in 1921 a further reduction to \$5,500,000,000 was made, and for 1922, the present fiscal year, the expenses have been still further lowered to \$3,947,000,000, and the anticipated expenditures for 1923 amount to \$3,650,000,000.

It is interesting in this connection to note that the appropriations for 1920 were \$939,000,000 less than the departments' recommendations; in 1921 they were \$1,474,000,000 less; in 1922, \$1,480,000,000 less, and for 1923 the recommendations of the committee are \$312,000,000 less than the recommendations of the Budget Director, indicating the thoroughness with which the examinations are made of proposed expenditures when the question comes before the Committee on Appropriations.

There have been cases where departments have come to us, for example, for \$125,000,000, and an examination of the subject by the Committee on Appropriations led to the conclusion that \$48,500,000 was all that could be legitimately used in connection



with the activity. There have also been cases where as much as \$12,000,000 has been asked for, and an examination by the committee disclosed the fact that no appropriation was necessary. Only a few days since a request came to the committee for an appropriation of \$3,000,000, and an examination disclosed the need of only about \$50,000.

A budget is simply a statement of the Government needs for the activities for the ensuing year in which it is expected to engage, and under existing law it will undoubtedly prove to be a great advantage as a medium through which to enforce economy.

It, after all, needs constant care on the part of the Congress to see that those in charge of the spending departments are held down to a proper conception of what the Government costs should be.

The responsibility for the recommendations under the Budget act are placed upon the President, but the final responsibility for the amount appropriated rests with the Congress. The President, on the one hand, states the case of the Government needs as he understands them. He outlines the activities in which he thinks the Government should engage, and the cost thereof. The Congress decides which of the activities recommended shall be conducted, and whether the amounts recommended shall be allowed; so that here we have under the Budget act two forces, each charged with separate responsibility, the Executive with the responsibility of outlining his program, and the Congress with the responsibility of limiting the cost of the program.

Prior to the enactment of the Budget act the estimates were submitted to the head of each department by the bureau chiefs. They were never revised before being submitted to the head of the department, and rarely ever after they came to him. Each department head submitted the recommendations of his department to the Secretary of the Treasury, who, in turn, assembled them without revision and sent them to Congress. This system necessarily engendered extravagance, and in many instances great waste. The present method places the responsibility on the President, who, for the first time in the nation's history, must assume the responsibility of stating his annual program, and in every case before the question comes to the President, revision of the bureau chiefs' recommendations has been forced by the head of the department through the department budget officer, and again by the Director of the Budget before reaching the President, so that the recommendations under the present

system will be more scientific than they ever have been. They will be considered with greater care and more in accordance with the needs of the public service, and, as time goes on, with proper watchfulness on the part of the Appropriations Committee, it may be hoped that there will be less need for revision by the Congress in the future than there has been in the past. But it is necessary to be watchful and always on guard to see that the enthusiasm of the bureau chiefs and department heads is not allowed to carry them off into extravagant waste of public funds.

...

## 81. POWERS AND POSITION OF THE COMPTROLLER GENERAL

As indicated in previous selections, there was established together with the budget system the General Accounting Office, under the direction of the Comptroller General. The independent and powerful position accorded to this officer, and the vigor with which the first Comptroller General (J. R. McCarl) administered the functions of his office, led to several clashes with other high officials as to the control of funds appropriated to particular departments. Probably in view of these clashes, Comptroller General McCarl reviewed the position and general nature of his office in his Report for 1927, a portion of which is here reproduced.

[*Annual Report of the Comptroller General of the United States, 1927, pp. iii-vi.*]

There are few of the manifold activities of the United States that may be carried on without the use of public money. The Congress, as the direct representatives of the people, is not only the sole lawmaking power of the United States, but it has, in trust, the exclusive power under Article I, section 8, of the Constitution to raise public money by means of taxes and customs duties, and the exclusive power under section 9 of that article to appropriate same for the conduct of the activities of the Government.

The retention, by the American people, of this control over the raising and spending of moneys for the common benefit was effected by placing this power in the hands of their direct representatives, who are required, at intervals, to render to them an account of the discharge of such stewardship. The provisions in the Constitution for such retention of power combine the best principles of the pure democracy of the ancient city states, the New England township, and the efficiency of a highly centralized Government. The people, in Congress, have the exclusive authority to grant or to withhold public funds for public uses, and

to grant such funds with such limitations or special directions as they may determine to be wise. By means of such control over public money, the people, in Congress, may exercise effective control over their Government, and may expand or contract its activities, and the activities of their more or less permanent officials as is deemed necessary or desirable.

The Congress learned during the early days of its existence, as the Parliament of England theretofore had learned, that it was necessary to prescribe with more or less particularity the method by which taxes or customs should be collected, and the purpose for which appropriated money might be used by officers of the executive branch of the Government. However, investigations into the actual conduct of executive officers in the discharge of the activities with which they were charged by law disclosed that the directions in the statutes, prepared with infinite pains and after far-reaching examination and most careful consideration, were not always observed. Albert Gallatin, a member of the early House of Representatives and the fourth Secretary of the Treasury, succeeded in having enacted into law a provision which is now section 3678, Revised Statutes, as follows:

All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

When the Congress has appropriated money for a specific purpose, it can not be admitted, under existing law, that the moneys appropriated for one purpose may be diverted to some other purpose excepting by the Congress collectively assembled itself first so authorizing. It is exclusively a legislative right and if sought to be elsewhere exercised would be legislating by other than the constitutional body and strike at the root of representative government, failing not only to observe the limitations and directions contained in the statutes making the appropriations or for their expenditure, but disregarding the general and expressed inhibition in statutory law against the diversion of public funds.

There have been recent occurrences presenting emergency conditions of such character that the Congress, if in session, would probably have granted assistance through special appropriation of public funds. The conditions were not entirely local but more extensive, involving a sufficiently widespread territory to be appealing to the country. It is referred to here because of the emergency situation that arises and demands prompt considera-

tion—and so that it may be considered before a recurrence again precipitates the dilemma of observing the law or action in disregard of lawful control of money expenditures. The assistance of the United States usually demanded and needed involves money expenditure. This always must be met by the question of appropriation. It is the lexicon of Government money uses that the Constitution prohibits the withdrawal of money from the Treasury except in consequence of appropriation by law—and, paralleling that, are the statutory provisions that appropriations must be applied solely to the object for which made. There is not, nor so far as can now be ascertained there has not been, any permanent appropriation for emergency conditions, nor has there been heretofore given any permanent authority to anyone to apply moneys to any other object than that for which made by the law of the appropriation. This leads to inquiries when catastrophies arise demanding aid of the United States, possibly justified, may moneys having in some instances a possible relation thereto be applied to other than the specific purpose, or must there be insisted on the letter of the law and the moneys be not applied otherwise than the clear letter of the law states. My duty therein is unquestioned, and I have without hesitation not given sanction to any proposition that purposed to divert the moneys from the clear appropriation purposes to the needs engendered by the catastrophic occurrence. For the accounting officers to have agreed to the course, even though unquestionably emergency conditions prevailed, would have been utter disregard of clear duty, for there has been as yet not entrusted to them for the doing alone or in conjunction with others the authority to divert appropriated funds. Whether there exists need for the Congress to grant such authority, or whether it may be without seriously diminishing the control of the Congress and the responsibility there for the uses of the public moneys so clearly contemplated by the Constitution, are questions for the Congress.

There is another phase of the matter proper for mention here. It is this. Under our present disbursing system, the frailties of which were attempted to be pointed out in my last annual report, which permits administratively controlled disbursing officers to draw funds from the Treasury and make uses thereof, even in disregard of applicable decisions of the accounting officers, there is strong inducement for administrative officers to overlook the law to meet emergency conditions appealing to them as worthy, and rely upon the popularity of the cause to later

obtain congressional approval of the unlawful expenditures. It appears a most serious matter that our system for disbursing public funds continues such as to so persuade administrative officials to violate a cardinal principle of the Constitution. If our form of government is to endure the law must control.

It seems necessary and timely that the situation be thus pointed out, so there may be understood the duty of the accounting officers in such matters under existing laws, the lure that lies in our present disbursing system, and the need for additional legislation if the Congress wishes to give authority to use in connection with emergencies occurring during periods of recess funds appropriated for other purposes.

The practical work of representative government in England, France, and the Dominion of Canada, as well as in the United States, has demonstrated the fact that limitations and directions in the statutes for the expenditure of public funds are not sufficient to insure the observance thereof. There must be some central organization to superintend, for the legislative bodies, the accounting for public money; that is, to prevent, so far as possible, the use of public money for unauthorized purposes, and to report to the legislative bodies such unauthorized uses as are not prevented. The necessity for a central organization arises because the changing character of representative assemblies does not permit such degree of familiarity and experience with the fiscal laws of the country as to enable their members to perform all of the many details required in accounting for public money; also, because such members must devote a major share of their attention to the actual work of legislation, although both the legislative assemblies of England and the Dominion of Canada established committees on accounts, wherein are considered the recommendations and reports of their respective chief accounting officers, and any claims for reduction of the number of disbursing and accountable officers from 1,000 or more to approximately 50.

While the expenditure of public money, after same has been appropriated, or the collection thereof in accordance with revenue-producing statutes, may be considered an executive function, it is believed that the history of representative assemblies in Anglo-Saxon countries, at least, demonstrates that accounting for such funds is a legislative function. Otherwise the officers who actually expend the money would account to themselves and thus the Congress could not prevent them from making expenditures from appropriated moneys for unauthorized purposes and

would be without information, necessary, in future legislation, as to the purposes for which the expenditures were actually made.

The Budget and Accounting Act of 1921 marked a return to the early practice in this country of making the chief accounting officer responsible directly to the Congress and independent of all direction from executive officers of the Government. Responsibility and independence from executive control align the position of the chief accounting officer of the United States to that of his counter-parts, even in parliamentary countries where the executive officers are themselves members of the legislative assemblies and responsible thereto for their acts. As executive officers in this country are members of the executive branch of the Government, and not subject to the control of the Congress except by impeachment, the wonder of it is that the chief accounting officer was ever made a part of the executive branch of the Government, as he was during the period from 1789 to 1921, when an officer of the Treasury Department.

It may be this was due to the fact that during such intervening period the revenue statutes produced an abundance of revenue, and there was little necessity for economy in the expenditure of public funds. After our entry into the World War, with its large increase in the public debt,<sup>o</sup> and subsequent expansion of governmental activities, such as aid to public roads, maternity act, and various other forms of aid to the States, internal revenue taxation reached such rates that there was public demand for their reduction and for a greater degree of economy in the expenditure of funds. The tightening up in the Budget and Accounting Act of 1921 of legislative control over the expenditures of public money was doubtless aided by a growing realization on the part of the executive officers that there could be no better testimony of the faithful discharge of their duties than a full and complete accounting to the legislative branch of the Government for the expenditure of public funds entrusted to them.

I am happy to report to the Congress that as this phase of the matter becomes better understood by the chief officers of the executive branch of the Government there has been more of co-operation and willingness, not only fully to account for the expenditure of public funds, but to secure the advice of this office by means of decisions in advance of incurring obligations as to whether the Congress had actually authorized the contemplated obligation.

## CHAPTER XIII

### REGULATION OF COMMERCE

#### 82. SCOPE OF COMMERCE POWER

The term "commerce," as used in the Constitution, is not in itself clear, but has been construed by the courts on numerous occasions, and particularly in the case of *Gibbons v. Ogden*. Robert Livingston and Robert Fulton had been given by the state of New York the monopoly of steam-boat navigation within that state, and had later sold their rights to Aaron Ogden. Meanwhile Thomas Gibbons, a citizen of New Jersey, acting under license from the federal government, began to operate a ferry from Elizabethtown, New Jersey, to New York City. Ogden thereupon secured an injunction from the New York courts, restraining Gibbons from operating the ferry, but on appeal the New York courts were overruled, the act of Congress held to be of superior obligation, and the term "commerce" given such a broad interpretation as greatly to enhance the power of Congress. Later (in 1878), the Supreme Court still further increased the power of Congress over commerce by its "expanding" interpretation of the Constitution.

##### a. Meaning of Commerce

[*Gibbons v. Ogden* (1824), 9 Wheat. 1, 186-197; 6 L. Ed. 23, 67-70.]

Mr. Chief Justice Marshall delivered the opinion of the Court,

. . .

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States. . . .

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescrib-



ing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense; because all have understood it in that sense, and the attempt to restrict it comes too late. . . .

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

. . .

We are now arrived at the inquiry, What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their iden-



tity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of Congress, then, comprehends navigation within the limits of every state in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies. . . .

### b. Doctrine of Expanding Power

[*Pensacola Telegraph Co. v. Western Union Telegraph Co.* (1878), 96 U. S. 1, 9-10; 24 L. Ed. 708, 710-711.]

Mr. Chief Justice Waite delivered the opinion of the Court. . . .

Since the case of *Gibbons v. Ogden* (9 Wheat. 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal system known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of times and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were entrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

It is not only important to the people, but to the government. By means of it the heads of departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly, as against hostile State legislation. In fact, from the beginning, it seems to have been assumed that Congress might aid in developing the system; for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore, only a little more than thirty years ago, with money appropriated by Congress for that purpose (5 Stat. 618); and large donations of land and money have since been made to aid in the construction of other lines (12 Stat. 489, 772; 13 id. 365; 14 id. 292). It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, and exclude all others from its use. The present case is satisfied, if we find that Congress has power, by appropriate legislation, to prevent the States from placing obstructions in the way of its usefulness.

The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all. . . .

## 83. ORIGINAL PACKAGE DOCTRINE

A Maryland act of 1821 required importers and dealers in foreign goods within that state to take out a license, for which a fee of \$50 was charged. Resistance to this requirement raised the question of the power of a state to tax such imports, and resulted in the enunciation of the so-called original package doctrine. Later this doctrine was extended to interstate commerce as well. Although since modified to some extent, both by acts of Congress and decisions of the courts, the effect has been to enhance materially the power of the national government as against that of the states.

[*Brown v. Maryland* (1827), 12 Wheat. 419, 436, 441-442, 448-449; 6 L. Ed. 678, 684, 686, 689.]

Mr. Chief Justice Marshall delivered the opinion of the Court:

. . .

The cause depends entirely on the question, whether the legislature of a state can constitutionally require the importer of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported. . . .

The constitutional prohibition on the states to lay a duty on imports—a prohibition which a vast majority of them must feel an interest in preserving—may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution. . . .

It has been contended, that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a state to tax its own citizens, or their property within its territory.

We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed, that the powers remaining with the states may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing power of the states must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the states may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the state from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a state from taxing any article passing through it from one state to another, for the purpose of traffic? or from taxing the transportation of articles passing from the state itself to another state, for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument further, or to give additional illustrations of it, because the subject was taken up, and considered with great attention, in *McCulloch v. The State of Maryland*, 4 Wheat. Rep. 316, the decision in which case is, we think, entirely applicable to this.

It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.

#### 84. RULE OF REASON

The Sherman Anti-Trust Act, passed in 1890, declared illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in

restraint of trade or commerce among the several states or with foreign nations"; and imposed criminal penalties for the violation of the act. Acting under this statute, suits were brought in 1906 and 1907 to dissolve the Standard Oil Company of New Jersey and the American Tobacco Company, which were charged with being such illegal monopolies. The lower courts issued decrees of dissolution and were, on appeal, sustained by the Supreme Court. In its opinion on these cases, however, the Supreme Court laid down the so-called "rule of reason," viz., that the act in question must be construed as prohibiting "undue" or "unreasonable" restraints of trade, and thus making more difficult the problem of enforcing the anti-trust legislation.

[*United States v. American Tobacco Co.* (1911), 221 U. S. 106, 179-180, 192-193; 55 L. Ed. 663, 693-694, 698-699.]

In that case [the Standard Oil Case] it was held, without departing from any previous decision of the court, that as the statute had not defined the words "restraint of trade," it became necessary to construe those words,—a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the previous decisions of this court, despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions (the *Trans-Missouri Freight Asso. and Joint Traffic Cases*, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, and 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25). That such view was a mistaken one was fully pointed out in the Standard Oil Case, and is additionally shown by a passage in the opinion in the Joint Traffic Case, as follows (171 U. S. 568): "The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." Applying the rule of reason to the construction of the statute, it was held in the Standard Oil Case that, as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade

by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret, which inevitably arose from the general character of the term "restraint of trade," required that the words "restraint of trade" should be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect. The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us. In truth, the plain demonstration which this record gives of the injury which would arise from, and the promotion of the wrongs which the statute was intended to guard against which would result from, giving to the statute a narrow, unreasoning, and unheard-of construction, as illustrated by the record before us, if possible serves to strengthen our conviction as to the correctness of the rule of construction—the rule of reason—which was applied in the Standard Oil Case, the application of which rule to the statute we now, in the most unequivocal terms, re-express and re-affirm.

...

Mr. Justice Harlan concurred in part and dissented in part:

...

If I do not misapprehend the opinion just delivered, the court insists that what was said in the opinion in the Standard Oil Case was in accordance with our previous decisions in the Trans-Missouri and Joint Traffic Cases, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25, if we resort to *reason*. This statement surprises me quite as much as would a statement that black was white or white was black. It is scarcely just to the majority in those two

cases for the court at this late day to say or to intimate that they interpreted the act of Congress without regard to the "rule of reason," or to assume, as the court now does, that the act was, for the first time, in the Standard Oil Case, interpreted in the "light of reason." One thing is certain, "rule of reason," to which the court refers, does not justify the perversion of the plain words of an act in order to defeat the will of Congress.

By every conceivable form of expression, the majority, in the Trans-Missouri and Joint Traffic Cases, adjudged that the act of Congress did not allow restraint of interstate trade to any extent or in any form, and three times it expressly rejected the theory, which had been persistently advanced, that the act should be construed as if it had in it the word "unreasonable" or "undue." But now the court, in accordance with what it denominates the "rule of reason," in effect inserts in the act the word "undue," which means the same as "unreasonable," and thereby makes Congress say what it did not say; what, as I think, it plainly did not intend to say; and what, since the passage of the act, it has explicitly refused to say. It has steadily refused to amend the act so as to tolerate a restraint of interstate commerce even where such restraint could be said to be "reasonable" or "due." In short, the court now, by judicial legislation, in effect amends an act of Congress relating to a subject over which that department of the government has exclusively cognizance. I beg to say that, in my judgment, the majority, in the former cases, were guided by the "rule of reason;" for it may be assumed that they knew quite as well as others what the rules of reason require when a court seeks to ascertain the will of Congress as expressed in a statute. It is obvious from the opinions in the former cases, that the majority did not grope about in darkness, but in discharging the solemn duty put on them they stood out in the full glare of the "light of reason," and felt and said, time and again, that the court could not, consistently with the Constitution, and would not, usurp the functions of Congress by indulging in judicial legislation. They said in express words, in the former cases, in response to the earnest contentions of counsel, that to insert by construction the word "unreasonable" or "undue" in the act of Congress would be *judicial legislation*. Let me say, also, that as we all agree that the combination in question was illegal under *any* construction of the anti-trust act, there was not the slightest necessity to enter upon an extended argument to show that the act of Congress was to be read as if it contained the word "unreasonable" or "undue." All that is said in the court's opinion



in support of that view is, I say with respect, *obiter dicta*, pure and simple.

## 85. RELATION BETWEEN INTERSTATE AND INTRASTATE COMMERCE

The Constitution seems to presume two fields of commerce, one subject to national and the other to state control. The distinction between these two fields appears to be gradually becoming less clear, as the commercial activities of the country become more important in scope and more complex in character. The closer interrelationship of the two fields of commerce has meant also a considerable increase in national power at the expense of the states. This development is shown most strikingly in the changing attitude of the courts towards the matter of railroad regulation. In the Minnesota Rate Cases (230 U. S. 352), decided in 1913, the Supreme Court upheld the power of the states to fix local rates (at least in the absence of congressional legislation), even though such rates affected also interstate commerce. In the so-called Shreveport Case (234 U. S. 342), decided a year later, the Court held that Congress, acting through the Interstate Commerce Commission, could regulate the relationship between intrastate and interstate rates in such a way as to prevent discrimination against interstate commerce. Finally, in 1922, the Court upheld the power of the Interstate Commerce Commission actually to fix intrastate rates where in its opinion necessary to secure the effectiveness of the interstate rate. In this case, the Court emphasized more than ever before the unity and interrelationship of commerce, and the paramount importance of the national over state interests.

[*Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy Railroad Co.* (1922), 257 U. S. 563, 588; 66 L. Ed. 371, 383.]

Mr. Chief Justice Taft . . . delivered the opinion of the court:

It is objected here, as it was in the Shreveport Case, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate the specific proviso of the original Interstate Commerce Act, repeated in the amending acts, that the Commission is not to regulate traffic wholly within a state. To this, the same answer must be made as was made in the Shreveport Case (234 U. S. 342, 358, 58 L. ed. 1341, 1351, 34 Sup. Ct. Rep. 833), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce, and necessary to its efficiency. Effective control of the one must embrace some control over the other, in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and



intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete, effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso.

## 86. RELATION BETWEEN COMMERCE POWER AND POLICE POWER

As was pointed out with respect to the power of taxation, so Congress has, in the exercise of its commerce power, enacted numerous measures that are in effect police regulations, and the courts have for the most part upheld these laws as appropriate regulations of commerce. Congress has in this manner suppressed lotteries, prevented the adulteration of foods and drugs, penalized the practice of white slavery, compelled the use of safety appliances on railroads, provided shorter hours and better working conditions for certain classes of labor, and so on. Finally, in response to the demand for the suppression of the evil of child labor, Congress in 1916 enacted a law prohibiting the shipment in interstate commerce of the products of mines or factories in which children under the ages of fourteen to sixteen were permitted to work. This act the Supreme Court, with four Justices dissenting, declared unconstitutional in 1918, certain limits thus being imposed on the power of Congress to enter the field of the states.

The converse of this problem has also caused difficulty, the police power of the states frequently being exercised in such manner as to affect interstate commerce. To meet this situation the courts devised the doctrine that, if such police regulations of any state amounted also to a direct regulation of interstate commerce, they could not be permitted; but if an indirect interference, they would be upheld. An important application of this doctrine was made by the Supreme Court in 1927, when it invalidated a Pennsylvania statute regulating the sale of steamship tickets by agencies, clearly an attempt to prevent fraud in such sales. The decision is notable for the sharp difference of opinion in the Court, and for the attempt on the part of the dissenting Justices to secure the abandonment of the doctrine of direct and indirect burdens on commerce.

### a. First Child Labor Case

[*Hammer v. Dagenhart* (1918), 247 U. S. 251, 271-274, 278-281; 62 L. Ed. 1101, 1105-1106, 1108-1110.]

Mr. Justice Day delivered the opinion of the court:

. . . The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the

states. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the commerce power. . . . The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof. . . .

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation. . . . If it were otherwise, all manufacture intended for interstate shipment would be brought under Federal control to the practical exclusion of the authority of the states,—a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the states. . . .

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other states where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the state of production. In other words, that the unfair competition thus engendered may be controlled by closing the channels of interstate commerce to manufacturers in those states where the local laws do not meet what Congress deems to be the more just standard of other states.

There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may co-operate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions. In some of the states laws have been passed fixing minimum wages for women; in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor

and the rate of compensation for women have not been fixed by a standard in use in other states and approved by Congress.

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the 10th Amendment to the Constitution.

Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. "This," said this court in *United States v. Dewitt*, 9 Wall. 41, 45, 19 L. ed. 593, 594, "has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion." . . .

Mr. Justice Holmes, dissenting: . . .

The question, then, is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the states in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any state.

The manufacture of oleomargarine is as much a matter of state regulation as the manufacture of cotton cloth. Congress levied a tax upon the compound when colored so as to resemble butter that was so great as obviously to prohibit the manufacture and sale. In a very elaborate discussion the present Chief Justice excluded any inquiry into the purpose of an act which, apart from that purpose was with the power of Congress. *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78. . . . Fifty years ago a tax on state banks, the obvious purpose and actual effect of which was to drive them, or at least their circulation, out of existence, was sustained, although the result was one that Congress had no constitutional power to require. . . .

The Pure Food and Drug Act was sustained in *Hipolite Egg Co. v. United States*, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364, with the intimation that "no trade can be carried on between the states to which it [the power of Congress to regulate commerce] does not extend," 57, applies not merely to articles that the changing opinions of time condemn as intrinsically harmful, but to others innocent in themselves, simply on the ground that the order for them was induced by a preliminary fraud. *Weeks v. United States*, 245 U. S. 618, ante, 513, 38 Sup. Ct. Rep. 219. It does not matter whether the supposed evil precedes or follows the transportation. It is enough that, in the opinion of Congress, the transportation encourages the evil. I may add that in the cases on the so-called White Slave Act it was established that the means adopted by Congress as convenient to the exercise of its power might have the character of police regulations. . . .

The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed,—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused,—it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where, in my opinion, they do not belong, this was pre-eminently a case for upholding the exercise of all its powers by the United States.

But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone, and that this court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this court to pronounce when prohibition is necessary to regulation if it ever may be necessary,—to say that it is permissible as against strong drink, but not as against the product of ruined lives.

The act does not meddle with anything belonging to the states. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the states, but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the states. Instead of being encountered by a prohibitive tariff at her

boundaries, the state encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. If, as has been the case within the memory of men still living, a state should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in *Champion v. Ames*. Yet in that case it would be said with quite as much force as in this that Congress was attempting to intermeddle with the state's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

[Justices McKenna, Brandeis, and Clarke concurred in this dissenting opinion.]

#### b. Doctrine of Direct and Indirect Interference

[*Giovanni di Santo v. Pennsylvania* (1927), U. S. Supreme Court Advance Opinions, Jan. 15, 1927, pp. 314-319.]

Mr. Justice Butler delivered the opinion of the court: . . .

The soliciting of passengers and the sale of steamship tickets and orders for passage between the United States and Europe constitute a well-recognized part of foreign commerce. . . . A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed. . . . Such legislation cannot be sustained as an exertion of the police power of the State to prevent possible fraud. . . . The Congress has complete and paramount authority to regulate foreign commerce and, by appropriate measures, to protect the public against the frauds of those who sell these tickets and orders. The sales here in question are related to foreign commerce as directly as are sales made in ticket offices maintained by the carriers and operated by their servants and employees. The license fee and other things imposed by the Act on plaintiff in error, who initiates for his principals a transaction in foreign commerce, constitute a direct burden on that commerce. . . .

Mr. Justice Stone, dissenting:

. . . We are not here concerned with a question of taxation to which other considerations may apply, but with state regulation

of what may be conceded to be an instrumentality of foreign commerce. As this Court has many times decided, the purpose of the commerce clause was not to preclude all state regulation of commerce crossing state lines, but to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign.

The recognition of the power of the states to regulate commerce within certain limits is a recognition that there are matters of local concern which may properly be subject to state regulation and which, because of their local character, as well as their number and diversity, can never be adequately dealt with by Congress. Such regulation, so long as it does not impede the free flow of commerce, may properly be and for the most part has been left to the states by the decisions of this Court.

In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, "direct" and "indirect interference" with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached.

It is difficult to say that such permitted interferences as those enumerated in Mr. Justice Brandeis' opinion are less direct than the interference prohibited here. But it seems clear that those interferences not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines.

I am not persuaded that the regulation here is more than local in character or that it interposes any barrier to commerce. Until Congress undertakes the protection of local communities from the dishonesty of the sellers of steamship tickets, it would seem that there is no adequate ground for holding that the regulation here involved is a prohibited interference with commerce.

Mr. Justice Holmes and Mr. Justice Brandeis concur in this opinion.

## CHAPTER XIV

### FOREIGN AFFAIRS

#### 87. THE MONROE DOCTRINE

As a corollary to our policy of aloofness from European affairs, it seemed appropriate that European nations should be warned against interfering in the affairs of the Western Hemisphere. An opportunity for issuing such a warning presented itself after the recognition by the United States in 1822 of the independence of the former Spanish-American colonies which had revolted and set up governments that were republican in form. Several nations of Europe, calling themselves the Holy Alliance, seemed bent on restoring these new American republics to Spain. In this emergency President Monroe sent to Congress in December, 1823, a message containing the famous doctrine which bears his name. The Monroe Doctrine so enunciated has continued to be the cardinal principle of our foreign policy for more than a century, but in its application it has received various interpretations and extensions. Thus President Roosevelt, in 1904, felt compelled to intervene in Santo Domingo for the purpose of maintaining order and avoiding any excuse for European intervention. In so doing, he justified himself by an interpretation of the Monroe Doctrine since known as the Roosevelt Corollary. Again, in 1912, when there were reports of a Japanese colonization scheme on Magdalena Bay in Lower California, Mexico, Senator Lodge secured the passage of a simple Senate resolution, which made a further extension of the Monroe Doctrine and is therefore commonly called the Lodge Amendment. Finally, President Wilson, in attempting to bring the warring nations together for a definition of peace terms in December, 1916, assumed that the United States would join in some concert of power for the preservation of peace. Such participation in world affairs he believed to be not a violation of the Monroe Doctrine, but an expansion of it to meet new conditions. His position was explained to the Senate in a notable address of January 22, 1917.

##### a. Original Monroe Doctrine

[Richardson, *Messages and Papers of the Presidents*, vol. II, pp. 217-219.]

It was stated at the commencement of the last session that a great effort was then making in Spain and Portugal to improve the condition of the people of those countries, and that it appeared to be conducted with extraordinary moderation. It need scarcely be remarked that the result has been, so far, very different from what was then anticipated. Of events in that quarter of the globe with which we have so much intercourse, and

from which we derive our origin, we have always been anxious and interested spectators. The citizens of the United States cherish sentiments the most friendly in favor of the liberty and happiness of their fellow-men on that side of the Atlantic. In the wars of the European powers in matters relating to themselves we have never taken any part, nor does it comport with our policy so to do. It is only when our rights are invaded or seriously menaced that we resent injuries or make preparation for our defense. With the movements in this hemisphere we are, of necessity, more immediately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective Governments. And to the defense of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. We owe it, therefore, to candor, and to the amicable relations existing between the United States and those powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States. In the war between these new governments and Spain we declared our neutrality at the time of their recognition, and to this we have adhered and shall continue to adhere, provided no change shall occur which, in the judgment of the competent authorities of this Government, shall make a corresponding change on the part of the United States indispensable to their security.

The late events in Spain and Portugal show that Europe is still unsettled. Of this important fact no stronger proof can be adduced than that the allied powers should have thought it proper, on any principle satisfactory to themselves, to have interposed, by force, in the internal concerns of Spain. To what extent such interposition may be carried, on the same principle,



is a question in which all independent powers whose governments differ from theirs are interested, even those most remote, and surely none more so than the United States. Our policy in regard to Europe, which was adopted at an early stage of the wars which have so long agitated that quarter of the globe, nevertheless remains the same, which is, not to interfere in the internal concerns of any of its powers; to consider the government de facto as the legitimate government for us; to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy, meeting, in all instances, the just claims of every power, submitting to injuries from none. But in regard to these continents, circumstances are eminently and conspicuously different. It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can anyone believe that our southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition, in any form, with indifference. If we look to the comparative strength and resources of Spain and those new governments, and their distance from each other, it must be obvious that she can never subdue them. It is still the true policy of the United States to leave the parties to themselves, in the hope that other powers will pursue the same course.

#### b. Roosevelt Corollary

[Message to Congress, December, 1904, in *Foreign Relations of the United States, 1904*, p. XLI.]

If a nation shows that it knows how to act with reasonable efficiency and decency in social and political matters; if it keeps order and pays its obligations, it need fear no interference from the United States. Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power.

### c. Magdalena Bay Resolution

[Senate Resolution, adopted Aug. 2, 1912. *Congressional Record*, vol. 48, pp. 10045-10047.]

*Resolved*, That when any harbor or other place in the American continents is so situated that the occupation thereof for military or naval purposes might threaten the communications or the safety of the United States, the Government of the United States could not see without grave concern the possession of such harbor or other place by any corporation or association which has such a relation to another Government, not American, as to give that Government practical power of control for naval or military purposes.

### d. Wilson Interpretation

[Address to Senate, Jan. 22, 1917. *Congressional Record*, vol. 54, p. 1741.]

And in holding out the expectation that the people and Government of the United States will join the other civilized nations of the world in guaranteeing the permanence of peace upon such terms as I have named, I speak with the greater boldness and confidence because it is clear to every man who can think that there is in this promise no breach in either our traditions or our policy as a nation, but a fulfilment, rather, of all that we have professed or striven for.

I am proposing, as it were, that the nations should with one accord adopt the doctrine of President Monroe as the doctrine of the world: that no nation should seek to extend its polity over any other nation or people, but that every people should be left free to determine its own polity, its own way of development, unhindered, unthreatened, unafraid, the little along with the great and powerful.

I am proposing that all nations henceforth avoid entangling alliances which would draw them into competitions of power, catch them in a net of intrigue and selfish rivalry, and disturb their own affairs with influences intruded from without. There is no entangling alliance in a concert of power. When all unite to act in the same sense and with the same purpose all act in the common interest and are free to live their own lives under a common protection.

## 88. TREATY OF PEACE WITH GERMANY

After the failure of the Senate of the United States to approve the Treaty of Versailles concluding the World War and containing the Covenant of the League of Nations, a technical state of war between the United States and Germany still continued, although hostilities had ceased with the signing of the Armistice on November 11, 1918. On July 2, 1921, Congress passed a joint resolution declaring the war to be at an end. This, however, was not in itself deemed to be sufficient. Consequently, in October of the same year we finally did what President Wilson had declared to be "unthinkable" and made a separate treaty of peace with Germany, in which we sought to preserve the same rights that we would have acquired had we ratified the Treaty of Versailles. The treaty, in part, is as follows.

[*U. S. Statutes at Large*, vol. 42, pp. 1939, 1940, 1942; *League of Nations Treaty Series*, vol. 12, pp. 192-200.]

### THE UNITED STATES OF AMERICA AND GERMANY:

Considering that the United States, acting in conjunction with its co-belligerents, entered into an Armistice with Germany on November 11, 1918, in order that a Treaty of Peace might be concluded;

Considering that the Treaty of Versailles was signed on June 28, 1919, and came into force according to the terms of its Article 440, but has not been ratified by the United States;

Considering that the Congress of the United States passed a Joint Resolution, approved by the President July 2, 1921, which reads in part as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled:

"That the state of war declared to exist between the Imperial German Government and the United States of America by the joint resolution of Congress approved April 6, 1917, is hereby declared at an end.

"Section 2. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the Armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the Treaty of Versailles, have been stipulated for its or their benefit; or to which

it is entitled as one of the Principal Allied and Associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise."

. . . . .

Being desirous of restoring the friendly relations existing between the two Nations prior to the outbreak of war:

Have for that purpose appointed their plenipotentiaries:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

Ellis Loring DRESEL, Commissioner of the United States of America to Germany, and

THE PRESIDENT OF THE GERMAN EMPIRE

Dr. Friedrich ROSEN, Minister for Foreign Affairs,

Who, having communicated their full powers, found to be in good and due form have agreed as follows:

#### ARTICLE 1

Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.

#### ARTICLE 2

With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1 of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV.

The United States, in availing itself of the rights and advantages stipulated in the provisions of that Treaty mentioned in this paragraph, will do so in a manner consistent with the rights accorded to Germany under such provisions.

(2) That the United States shall not be bound by the provisions of Part I of that Treaty, nor by any provisions of that Treaty, including those mentioned in Paragraph (1) of this

Article, which relate to the Covenant of the League of Nations, or by the Council or by the Assembly thereof, unless the United States shall expressly give the assent to such action.

(3) That the United States assumes no obligations under or with respect to the provisions of Part II, Part III, Sections 2 to 8 inclusive of Part IV, and Part XIII of that Treaty.

(4) That, while the United States is privileged to participate in the Reparation Commission, according to the terms of Part VIII of that Treaty, and in any other Commission established under the Treaty or under any agreement supplemental thereto, the United States is not bound to participate in any such commission unless it shall elect to do so.

(5) That the periods of time to which reference is made in Article 440 of the Treaty of Versailles shall run, with respect to any act or election on the part of the United States, from the date of the coming into force of the present Treaty.

### ARTICLE 3

The present Treaty shall be ratified in accordance with the constitutional forms of the High Contracting Parties and shall take effect immediately on the exchange of ratifications, which shall take place as soon as possible at Berlin.

In witness whereof, the respective plenipotentiaries have signed this Treaty and have hereunto affixed their seals.

Done in duplicate in Berlin this twenty-fifth day of August, 1921.

Ellis Loring DRESEL.  
ROSEN.

## 89. EXECUTIVE AGREEMENTS

In the conduct of our foreign relations, it not infrequently becomes necessary for the President, or agents acting on his behalf, to make agreements with other nations without the formality of submitting them to the Senate for its advice and consent. Such executive agreements sometimes prove to be permanent arrangements, but usually they are intended to serve merely until a definitive treaty covering the same matters can be made. These temporary or provisional agreements are sometimes called protocols or *modi vivendi*. Thus, on August 12, 1898, the American Secretary of State and the French Ambassador at Washington, the latter acting on behalf of the government of Spain, signed a protocol of agreement as to the basis of peace between the two governments. Its provisions were subsequently incorporated in the definitive treaty of peace. Similarly, an agreement, entered into November 2, 1917, by an exchange of notes be-

Ishii for Japan, undertook to define our attitude towards current questions in the Far East and recognized the special interest of Japan in that region on account of her territorial propinquity. After the Washington Conference of 1921-22 and the treaties entered into thereat, which covered the subject matter of the Lansing-Ishii agreement, the latter was deemed no longer to serve a useful purpose. Consequently, on April 14, 1923, the cancellation of the agreement was effected through the exchange of identic notes between Secretary of State Hughes and Ambassador Hanihara.

#### a. Protocol with Spain, 1898

[Malloy, *Treaties, Conventions . . . between the United States and Other Powers*, vol. II, pp. 1688-1689.]

William R. Day, Secretary of State of the United States, and His Excellency Jules Cambon, Ambassador Extraordinary and Plenipotentiary of the Republic of France at Washington, respectively possessing for this purpose full authority from the Government of the United States and the Government of Spain, have concluded and signed the following articles, embodying the terms on which the two Governments have agreed in respect to the matters hereinafter set forth, having in view the establishment of peace between the two countries, that is to say:

#### ARTICLE I

Spain will relinquish all claim of sovereignty over and title to Cuba.

#### ARTICLE II

Spain will cede to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also an island in the Ladrones to be selected by the United States.

#### ARTICLE III

The United States will occupy and hold the city, bay and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition and government of the Philippines.

#### ARTICLE IV

Spain will immediately evacuate Cuba, Porto Rico and other islands now under Spanish sovereignty in the West Indies; and to this end each Government will, within ten days after the signing of this protocol, appoint Commissioners, and the Com-

missioners so appointed shall, within thirty days after the signing of this protocol, meet at Havana for the purpose of arranging and carrying out the details of the aforesaid evacuation of Cuba and the adjacent Spanish islands; and each Government will, within ten days after the signing of this protocol, also appoint other Commissioners, who shall, within thirty days after the signing of this protocol, meet at San Juan, in Porto Rico, for the purpose of arranging and carrying out the details of the aforesaid evacuation of Porto Rico and other islands now under Spanish sovereignty in the West Indies.

#### ARTICLE V

The United States and Spain will each appoint not more than five commissioners to treat of peace, and the commissioners so appointed shall meet at Paris not later than October 1, 1898, and proceed to the negotiation and conclusion of a treaty of peace, which treaty shall be subject to ratification according to the respective constitutional forms of the two countries.

#### ARTICLE VI

Upon the conclusion and signing of this protocol, hostilities between the two countries shall be suspended, and notice to that effect shall be given as soon as possible by each Government to the commanders of its military and naval forces.

Done at Washington in duplicate, in English and in French, by the Undersigned, who have hereunto set their hands and seals, the 12th day of August 1898.

(SEAL)

WILLIAM R. DAY.

(SEAL)

JULES CAMBON.

#### b. Cancellation of Lansing-Ishii Agreement

[*American Journal of International Law*, vol. 17, p. 510 (July, 1923).]

Secretary Hughes thus wrote to Mr. Hanihara:

I have the honor to communicate to your Excellency my understanding of the views developed by the discussions which I have recently had with your Embassy in reference to the status of the Lansing-Ishii exchange of notes of November 2, 1917.

The discussions between the two Governments have disclosed an identity of view and, in the light of the understandings arrived at by the Washington Conference on the Limitation of

Armament, the American and Japanese Governments are agreed to consider the Lansing-Ishii correspondence of November 2, 1917, as cancelled and of no further force or effect.

On the same date Ambassador Hanihara wrote to Secretary Hughes:

I have the honor to acknowledge the receipt of your note of today's date, communicating to me your understanding of the views developed by the discussions which you have recently had with this Embassy in reference to the status of the Ishii-Lansing exchange of notes of November 2, 1917.

I am happy to be able to confirm to you, under instructions from my Government, your understanding of the views thus developed, as set forth in the following terms:

The discussions between the two Governments have disclosed an identity of view and, in the light of the understandings arrived at by the Washington Conference on the Limitation of Armament, the Japanese and American Governments are agreed to consider the Ishii-Lansing correspondence of November 2, 1917, as cancelled and of no further force or effect.

## 90. PRESIDENTIAL PROCLAMATION OF NEUTRALITY

It is customary for the President, at the outbreak of a war to which the United States is not a party, to issue a proclamation of neutrality between the belligerents. This was done for the first time by President Washington in 1793, upon the outbreak of war between France and Great Britain. This proclamation was put forth by the President after consultation with his cabinet, and is a landmark in the history both of international law and of the governmental practice and policy of the United States toward European powers. In August, 1914, another general European conflagration broke out and President Wilson, following the precedent set by Washington, issued a proclamation of neutrality. That of Washington in full and that of Wilson in part are as follows.

### a. Washington's Proclamation of 1793

[*American State Papers, Foreign Relations*, vol. I, p. 140. Facsimile in Moore, *Principles of American Diplomacy*, p. 41.]

By the President of the United States of America.

### A PROCLAMATION

WHEREAS it appears that a state of war exists between Austria, Prussia, Sardinia, Great-Britain, and the United Netherlands, of the one part, and France on the other, and the duty and interest of the United States require, that they should with sincerity and



good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers:

I have therefore thought fit by these presents to declare the disposition of the United States to observe the conduct aforesaid towards those powers respectively; and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition.

And I do hereby also make known that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding or abetting hostilities against any of the said powers, or by carrying to any of them those articles, which are deemed contraband by the modern usage of nations, will not receive the protection of the United States, against such punishment or forfeiture: and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the Law of Nations, with respect to the powers at war, or any of them.

IN TESTIMONY WHEREOF I have caused the Seal of the United States of America to be affixed to these presents, and signed the same with my hand. Done at the city of Philadelphia, the twenty-second day of April, one thousand seven hundred and ninety-three, and of the Independence of the United States of America the seventeenth.

G<sup>o</sup>. WASHINGTON.

By the President.

TH: JEFFERSON

#### b. Wilson's Proclamation of 1914

[*U. S. Statutes at Large*, vol. 38, pp. 1999-2002.]

By the President of the United States of America.

#### A PROCLAMATION

Whereas a state of war unhappily exists between Austria-Hungary and Servia and between Germany and Russia and between Germany and France; And Whereas the United States is on terms of friendship and amity with the contending powers, and with the persons inhabiting their several dominions:

And Whereas there are citizens of the United States residing

within the territories or dominions of each of the said belligerents and carrying on commerce, trade, or other business or pursuits therein;

And Whereas there are subjects of each of the said belligerents residing within the territory or jurisdiction of the United States, and carrying on commerce, trade, or other business or pursuits therein;

And Whereas the laws and treaties of the United States, without interfering with the free expression of opinion and sympathy, or with the commercial manufacture or sale of arms or munitions of war, nevertheless impose upon all persons who may be within their territory and jurisdiction the duty of an impartial neutrality during the existence of the contest;

And Whereas it is the duty of a neutral government not to permit or suffer the making of its waters subservient to the purposes of war;

Now, Therefore, I, Woodrow Wilson, President of the United States of America, in order to preserve the neutrality of the United States and of its citizens and of persons within its territory and jurisdiction, and to enforce its laws and treaties, and in order that all persons, being warned of the general tenor of the laws and treaties of the United States in this behalf, and of the law of nations, may thus be prevented from any violation of the same, do hereby declare and proclaim that by certain provisions of the act approved on the 4th day of March, A. D. 1909, commonly known as the "Penal Code of the United States" the following acts are forbidden to be done, under severe penalties, within the territory and jurisdiction of the United States, to-wit:—

1. Accepting and exercising a commission to serve either of the said belligerents by land or by sea against the other belligerent.
2. Enlisting or entering into the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.
3. Hiring or retaining another person to enlist or enter himself in the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.
4. Hiring another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted as aforesaid.
5. Hiring another person to go beyond the limits of the United States with intent to be entered into service as aforesaid.

6. Retaining another person to go beyond the limits of the United States with intent to be enlisted as aforesaid.

7. Retaining another person to go beyond the limits of the United States with intent to be entered into service as aforesaid. (But the said act is not to be construed to extend to a citizen or subject of either belligerent who, being transiently within the United States, shall, on board of any vessel of war, which, at the time of its arrival within the United States, was fitted and equipped as such vessel of war, enlist or enter himself or hire or retain another subject or citizen of the same belligerent, who is transiently within the United States, to enlist or enter himself to serve such belligerent on board such vessel of war, if the United States shall then be at peace with such belligerent.)

8. Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either of the said belligerents.

9. Issuing or delivering a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid.

10. Increasing or augmenting, or procuring to be increased or augmented, or knowingly being concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship of war, cruiser, or armed vessel in the service of either of the said belligerents, or belonging to the subjects of either, by adding to the number of guns of such vessels, or by changing those on board of her for guns of a larger calibre, or by the addition thereto of any equipment solely applicable to war.

11. Beginning or setting on foot or providing or preparing the means for any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States against the territories or dominions of either of the said belligerents.

. . . . .

And I do further declare and proclaim that the statutes and the treaties of the United States and the law of nations alike require that no person, within the territory and jurisdiction of the United States, shall take part, directly or indirectly, in the said wars, but shall remain at peace with all of the said belligerents, and shall maintain a strict and impartial neutrality.

And I do hereby enjoin all citizens of the United States, and

all persons residing or being within the territory or jurisdiction of the United States, to observe the laws thereof, and to commit no act contrary to the provisions of the said statutes or treaties or in violation of the law of nations in that behalf.

And I do hereby warn all citizens of the United States, and all persons residing or being within its territory or jurisdiction that, while the free and full expression of sympathies in public and private is not restricted by the laws of the United States, military forces in aid of a belligerent can not lawfully be originated or organized within its jurisdiction; and that, while all persons may lawfully and without restriction by reason of the aforesaid state of war manufacture and sell within the United States arms and munitions of war, and other articles ordinarily known as "contraband of war", yet they cannot carry such articles upon the high seas for the use or service of a belligerent, nor can they transport soldiers and officers of a belligerent, or attempt to break any blockade which may be lawfully established and maintained during the said wars without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf.

And I do hereby give notice that all citizens of the United States and others who may claim the protection of this government, who may misconduct themselves in the premises, will do so at their peril, and that they can in no wise obtain any protection from the government of the United States against the consequences of their misconduct.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this fourth day of August in the year of our Lord one thousand nine hundred and fourteen and of the independence of the United States of America the one hundred and thirty-ninth.

WOODROW WILSON.

By the President:

WILLIAM JENNINGS BRYAN  
Secretary of State.

## 91. RECOGNITION OF PANAMA

The United States has, as a rule, adopted a liberal policy in recognizing new governments. The act of recognition may be express, as in the case of a treaty made containing a stipulation to that effect, or it may be implied through the sending or receiving of diplomatic representatives. In the case of Panama we adopted both methods. This case was note-

worthy on account of the unusually short time which elapsed between the actual establishment of an independent Panama government and our recognition of its independence. Early in November, 1903, the revolution occurred in Panama. On the 13th of the same month the President received a diplomatic representative from the infant republic and on the 18th a treaty was concluded formally recognizing its independence. (Malloy, *Treaties, Conventions, etc.* II, 1349.) On the occasion of the reception of the diplomatic representative, the following exchange of remarks took place between him and the President.

[*Foreign Relations of the United States, 1903, pp. 245-246.*]

*Remarks made by the minister of Panama on the occasion of the presentation of his letters of credence.*

MR. PRESIDENT: In according to the minister plenipotentiary of the Republic of Panama the honor of presenting to you his letters of credence you admit into the family of nations the weakest and the last born of the republics of the New World.

It owes its existence to the outburst of the indignant grief which stirred the hearts of the citizens of the Isthmus on beholding the despotic action which sought to forbid their country from fulfilling the destinies vouchsafed to it by Providence.

In consecrating its right to exist, Mr. President, you put an end to what appeared to be the interminable controversy as to the rival waterways, and you definitely inaugurate the era of the achievement of the Panama Canal.

From this time forth the determination of the fate of the canal depends upon two elements alone, now brought face to face, singularly unlike as regards their authority and power, but wholly equal in their common and ardent desire to see at last the accomplishment of the heroic enterprise for piercing the mountain barrier of the Andes.

The highway from Europe to Asia, following the pathway of the sun, is now to be realized.

The early attempts to find such a way unexpectedly resulted in the greatest of all historic achievements, the discovery of America. Centuries have since rolled by, but the pathway sought has hitherto remained in the realm of dreams. To-day, Mr. President, in response to your summons, it becomes a reality.

*The President's reply to the remarks made by  
Senor Bunau-Varilla on the occasion of the presentation  
of his letters of credence.*

MR. MINISTER: I am much gratified to receive the letters whereby you are accredited to the Government of the United

States in the capacity of envoy extraordinary and minister plenipotentiary of the Republic of Panama.

In accordance with its long-established rule, this Government has taken cognizance of the act of the ancient territory of Panama in reasserting the right of self-control and, seeing in the recent events on the Isthmus an unopposed expression of the will of the people of Panama and the confirmation of their declared independence by the institution of a *de facto* government, republican in form and spirit, and alike able and resolved to discharge the obligations pertaining to sovereignty, we have entered into relations with the new Republic. It is fitting that we should do so now, as we did nearly a century ago when the Latin people of America proclaimed the right of popular government, and it is equally fitting that the United States should, now as then, be the first to stretch out the hand of fellowship and to observe toward the new-born State the rules of equal intercourse that regulate the relations of sovereignties toward one another.

I feel that I express the wish of my countrymen in assuring you, and through you the people of the Republic of Panama, of our earnest hope and desire that stability and prosperity shall attend the new State, and that, in harmony with the United States, it may be the providential instrument of untold benefit to the civilized world through the opening of a highway of universal commerce across its exceptionally favored territory.

For yourself, Mr. Minister, I wish success in the discharge of the important mission to which you have been called.

## 92. SENATE RESERVATIONS TO THE LEAGUE OF NATIONS

One of President Wilson's famous fourteen points was that "a general association of nations must be formed under specific covenants, for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike." In order to carry out this plan there was inserted in the Treaty of Versailles an article known as the Covenant of the League of Nations, providing for an international organization composed of a council, an assembly, and other organs. One reason for the insertion of the Covenant in the Treaty was that it was thought that by combining the two proposals in one document it would make it easier to obtain the adoption of the Covenant by the various nations. As far as the United States was concerned, however, this expectation failed to be realized, since the treaty containing the Covenant did not receive the approval of the necessary majority in the Senate. An unsuccessful attempt to render the Covenant satisfactory to the Senate was made through attaching certain reservations, which indicate by implication some of the objections raised in the Senate against the Covenant. These reser-

vations, as finally voted upon in the Senate on March 19, 1920, are as follows.

[*Congressional Record*, vol. 59, p. 4599.]

## RESOLUTION OF RATIFICATION

*Resolved* (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Treaty of Peace with Germany concluded at Versailles on the 28th day of June, 1919, subject to the following reservations and understandings, which are hereby made a part and condition of this resolution of ratification, which ratification is not to take effect or bind the United States until the said reservations and understandings adopted by the Senate have been accepted as a part and a condition of this resolution of ratification by the Allied and Associated Powers and a failure on the part of the Allied and Associated Powers to make objection to said reservations and understandings prior to the deposit of ratification by the United States shall be taken as a full and final acceptance of such reservations and understandings by said powers:

1. The United States so understands and construes Article 1 that in case of notice of withdrawal from the League of Nations, as provided in said article, the United States shall be the sole judge as to whether all its international obligations and all its obligations under the said Covenant have been fulfilled, and notice of withdrawal by the United States may be given by a concurrent resolution of the Congress of the United States.

2. The United States assumes no obligation to preserve the territorial integrity or political independence of any other country by the employment of its military or naval forces, its resources, or any form of economic discrimination, or to interfere in any way in controversies between nations, including all controversies relating to territorial integrity or political independence, whether members of the League or not, under the provisions of Article 10, or to employ the military or naval forces of the United States, under any article of the treaty for any purpose, unless in any particular case the Congress, which, under the Constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States, shall, in the exercise of full liberty of action, by act or joint resolution so provide.

3. No mandate shall be accepted by the United States under Article 22, Part 1, or any other provision of the Treaty of Peace

with Germany, except by action of the Congress of the United States.

4. The United States reserves to itself exclusively the right to decide what questions are within its domestic jurisdiction and declares that all domestic and political questions relating wholly or in part to its internal affairs, including immigration, labor, coastwise traffic, the tariff, commerce, the suppression of traffic in women and children and in opium and other dangerous drugs, and all other domestic questions, are solely within the jurisdiction of the United States and are not under this treaty to be submitted in any way either to arbitration or to the consideration of the Council or of the Assembly of the League of Nations, or any agency thereof, or to the decision or recommendation of any other power.

5. The United States will not submit to arbitration or to inquiry by the Assembly or by the Council of the League of Nations, provided for in said treaty of peace, any questions which in the judgment of the United States depend upon or relate to its long-established policy, commonly known as the Monroe Doctrine; said doctrine is to be interpreted by the United States alone and is hereby declared to be wholly outside the jurisdiction of said League of Nations and entirely unaffected by any provision contained in the said Treaty of Peace with Germany.

6. The United States withholds its assent to Articles 156, 157, and 158, and reserves full liberty of action with respect to any controversy which may arise under said articles.

7. No person is or shall be authorized to represent the United States, nor shall any citizen of the United States be eligible, as a member of any body or agency established or authorized by said Treaty of Peace with Germany, except pursuant to an act of the Congress of the United States providing for his appointment and defining his powers and duties.

8. The United States understands that the reparation commission will regulate or interfere with exports from the United States to Germany, or from Germany to the United States, only when the United States by act or joint resolution of Congress approves such regulation or interference.

9. The United States shall not be obligated to contribute to any expenses of the League of Nations, or of the secretariat, or of any commission, or committee, or conference, or other agency, organized under the League of Nations or under the treaty or for the purpose of carrying out the treaty provisions, unless and until an appropriation of funds available for such expenses



shall have been made by the Congress of the United States: *Provided*, That the foregoing limitation shall not apply to the United States' proportionate share of the expense of the office force and salary of the secretary-general.

10. No plan for the limitation of armaments proposed by the Council of the League of Nations under the provisions of Article 8 shall be held as binding the United States until the same shall have been accepted by Congress, and the United States reserves the right to increase its armament without the consent of the Council whenever the United States is threatened with invasion or engaged in war.

11. The United States reserves the right to permit, in its discretion, the nationals of a covenant-breaking State, as defined in Article 16 of the Covenant of the League of Nations, residing within the United States or in countries other than such covenant-breaking State, to continue their commercial, financial, and personal relations with the nationals of the United States.

12. Nothing in Articles 296, 297, or in any of the annexes thereto or in any other article, section, or annex of the Treaty of Peace with Germany shall, as against citizens of the United States, be taken to mean any confirmation, ratification or approval of any act otherwise illegal or in contravention of the rights of citizens of the United States.

13. The United States withholds its assent to Part XIII (Articles 387 to 427, inclusive) unless Congress by act or joint resolution shall hereafter make provision for representation in the organization established by said Part XIII, and in such event the participation of the United States will be governed and conditioned by the provisions of such act or joint resolution.

14. Until Part I, being the Covenant of the League of Nations, shall be so amended as to provide that the United States shall be entitled to cast a number of votes equal to that which any member of the League and its self-governing dominions, colonies, or parts of empire, in the aggregate shall be entitled to cast, the United States assumes no obligation to be bound except in cases where Congress has previously given its consent, by any election, decision, report, or finding of the Council or Assembly in which any member of the League and its self-governing dominions, colonies, or parts of empire, in the aggregate have cast more than one vote.

The United States assumes no obligation to be bound by any decision, report, or finding of the Council or Assembly arising out of any dispute between the United States and any member

of the League if such member, or any self-governing dominion, colony, empire, or part of empire united with it politically has voted.

15. In consenting to the ratification of the Treaty with Germany the United States adheres to the principle of self-determination and to the resolution of sympathy with the aspirations of the Irish people for a government of their own choice adopted by the Senate June 6, 1919, and declares that when such government is attained by Ireland, a consummation it is hoped is at hand, it should promptly be admitted as a member of the League of Nations.

### 93. SENATE RESERVATIONS TO THE WORLD COURT

This court, established at The Hague, is known officially as the Permanent Court of International Justice. The Covenant of the League of Nations contained a provision requiring the Council of the League to formulate plans for such a court. This was done, and late in 1920 the statute providing for the Court was submitted to the various nations for ratification. In 1923 Presidents Harding and Coolidge recommended that the United States should join the Court, with suitable reservations. This, however, required the approval of the Senate. It was not until nearly three years later (on January 27, 1926), that the Senate finally gave its conditional approval. The opposition to the proposal was due to a feeling among some senators that the Court was so closely connected with the League of Nations that we could not join the Court without becoming "entangled" in the League. In order to meet this and other objections, the following elaborate reservations and conditions were incorporated in the resolution providing for American adhesion to the Court.

[*Congressional Record*, vol. 67, pp. 2824-2825.]

Whereas the President, under date of February 24, 1923, transmitted a message to the Senate, accompanied by a letter from the Secretary of State, dated February 17, 1923, asking the favorable advice and consent of the Senate to the adherence on the part of the United States to the Protocol of December 16, 1920, of Signature of the Statute for the Permanent Court of International Justice, set out in the said message of the President (without accepting or agreeing to the optional clause for compulsory jurisdiction contained therein), upon the conditions and understandings hereafter stated, to be made a part of the instrument of adherence: Therefore, be it

*Resolved (two-thirds of the Senators present concurring)* That the Senate advise and consent to the adherence on the part of the United States to the said Protocol of December 16, 1920, and the adjoined Statute for the Permanent Court of International

Justice (without accepting or agreeing to the optional clause for compulsory jurisdiction contained in said Statute), and that the signature of the United States be affixed to the said Protocol, subject to the following reservations and understandings, which are hereby made a part and condition of this resolution, namely:

1. That such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the treaty of Versailles.

2. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other states, members, respectively, of the Council and Assembly of the League of Nations, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy judges of the Permanent Court of International Justice or for the filling of vacancies.

3. That the United States will pay a fair share of the expenses of the Court as determined and appropriated from time to time by the Congress of the United States.

4. That the United States may at any time withdraw its adherence to the said Protocol and that the Statute for the Permanent Court of International Justice adjoined to the Protocol shall not be amended without the consent of the United States.

5. That the Court shall not render any advisory opinion except publicly after due notice to all states adhering to the Court and to all interested states and after public hearing or opportunity for hearing given to any state concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.

The signature of the United States to the said Protocol shall not be affixed until the powers signatory to such Protocol shall have indicated, through an exchange of notes, their acceptance of the foregoing reservations and understandings as a part and a condition of adherence by the United States to the said Protocol.

*Resolved further*, As a part of this act of ratification that the United States approve the Protocol and Statute hereinabove mentioned, with the understanding that recourse to the Permanent Court of International Justice for the settlement of differences between the United States and any other state or states can be had only by agreement thereto through general or special treaties concluded between the parties in dispute; and

*Resolved further*, That adherence to the said Protocol and

Statute hereby approved shall not be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state; nor shall adherence to the said Protocol and Statute be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions.

#### 94. THE FOUR POWER PACIFIC TREATY

At the Washington Conference of 1921-22 the principal question discussed was the limitation of armament. It was realized, however, that nations would not readily agree to such limitation unless some settlement were reached regarding certain outstanding questions which were likely to lead to international difficulties. Among such questions were those dealing with the Pacific and Far East and these were consequently included on the agenda of the Conference. Among the results of their consideration was the signing on December 13, 1921, of the Pacific Treaty by the four principal powers, the United States, Great Britain, France, and Japan. This treaty, which supersedes the Anglo-Japanese alliance, was proclaimed on August 21, 1923.

[*U. S. Statutes at Large*, vol. 43, pt. 2, pp. 1646-1649.]

##### I

The High Contracting Parties agree as between themselves to respect their rights in relation to their insular possessions and insular dominions in the region of the Pacific Ocean.

If there should develop between any of the High Contracting Parties a controversy arising out of any Pacific question and involving their said rights which is not satisfactorily settled by diplomacy and is likely to affect the harmonious accord now happily subsisting between them, they shall invite the other High Contracting Parties to a joint conference to which the whole subject will be referred for consideration and adjustment.

##### II

If the said rights are threatened by the aggressive action of any other Power, the High Contracting Parties shall communicate with one another fully and frankly in order to arrive at any understanding as to the most efficient measures to be taken, jointly or separately, to meet the exigencies of the particular situation.

## III

This Treaty shall remain in force for ten years from the time it shall take effect, and after the expiration of said period it shall continue to be in force subject to the right of any of the High Contracting Parties to terminate it upon twelve months' notice.

## IV

This Treaty shall be ratified as soon as possible in accordance with the constitutional methods of the High Contracting Parties and shall take effect on the deposit of ratifications, which shall take place at Washington, and thereupon the agreement between Great Britain and Japan, which was concluded at London on July 13, 1911, shall terminate.

## 95. THE PLATT AMENDMENT

The terms of the protectorate which the United States exercises over Cuba are embodied in the so-called Platt Amendment, the provisions of which were largely drafted by Secretary of War Elihu Root and inserted in the Army Appropriations Act of March 2, 1901. These terms were also embodied verbatim in a treaty between the United States and Cuba, ratified in 1904. They are important not only as fixing our relations with Cuba but also as forming a precedent for the policy pursued by the United States towards other Latin-American countries, such as Haiti and San Domingo.

[Malloy, *Treaties, Conventions, etc.*, vol. I, pp. 362-363.]

*Provided further*, That in fulfillment of the declaration contained in the joint resolution approved April twentieth, eighteen hundred and ninety-eight, entitled, "For the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect," the President is hereby authorized to "leave the government and control of the island of Cuba to its people" so soon as a government shall have been established in said island under a constitution which, either as a part thereof or in an ordinance appended thereto, shall define the future relations of the United States with Cuba, substantially as follows:

"I. That the government of Cuba shall never enter into any

treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise, lodgment in or control over any portion of said island.

"II. That said government shall not assume or contract any public debt, to pay the interest upon which, and to make reasonable sinking fund provision for the ultimate discharge of which, the ordinary revenues of the island, after defraying the current expenses of government shall be inadequate.

"III. That the government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba.

"IV. That all Acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected.

"V. That the government of Cuba will execute, and as far as necessary extend, the plans already devised or other plans to be mutually agreed upon, for the sanitation of the cities of the island, to the end that a recurrence of epidemic and infectious diseases may be prevented thereby assuring protection to the people and commerce of Cuba, as well as to the commerce of the southern ports of the United States and the people residing therein.

"VI. That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty.

"VII. That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points to be agreed upon with the President of the United States.

"VIII. That by way of further assurance the government of Cuba will embody the foregoing provisions in a permanent treaty with the United States."

## 96. EMBARGO ON ARMS TO MEXICO

In order to carry on hostile operations against the governments of Mexico or other unstable Latin-American countries, the revolutionists are usually dependent upon outside sources in order to secure arms. The principal source of supply is the United States, and the ease or difficulty with which they are able to secure arms from the United States naturally has considerable influence upon their activities and also upon the stability of the existing government. If the United States has recognized such government, we may deem it sound policy to assist it in maintaining itself in power by preventing arms from reaching the revolutionists. On the other hand, if the existing government fails to meet the demands of the United States as to the protection of our citizens or property rights therein, we may bring pressure on it by threatening to allow arms to reach revolutionary bands which nearly always exist in some section of the country. The embargo on the shipment of arms from the United States is established by proclamation of the President under authority granted to him by Congress. Thus, under authority of a joint resolution passed by Congress on January 31, 1922, President Coolidge on January 7, 1924, issued the following proclamation establishing an embargo on the shipment of arms to Mexico, except such as might be approved by our government for shipment to the government of Mexico which we had recognized.

[*U. S. Statutes at Large*, vol. 43, pt. 2, pp. 1934-1935.]

By the President of the United States of America.

## A PROCLAMATION

Whereas, Section I of a Joint Resolution of Congress, entitled a "Joint Resolution To prohibit the exportation of arms or munitions of war from the United States to certain countries, and for other purposes," approved January 31, 1922, provides as follows:

"That whenever the President finds that in any American country, or in any country in which the United States exercises extraterritorial jurisdiction, conditions of domestic violence exist, which are or may be promoted by the use of arms or munitions of war procured from the United States, and makes proclamation thereof, it shall be unlawful to export, except under such limitations and exceptions as the President prescribes any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress."

And whereas, it is provided by Section II of the said Joint Resolution that "Whoever exports any arms or munitions of war in violation of Section I shall on conviction be punished by fine

not exceeding \$10,000, or by imprisonment not exceeding two years, or both."

Now, therefore, I, Calvin Coolidge, President of the United States of America, acting under and by virtue of the authority conferred in me by the said Joint Resolution of Congress do hereby declare and proclaim that I have found that there exist in Mexico such conditions of domestic violence which are or may be promoted by the use of arms or munitions of war procured from the United States as contemplated by the said Joint Resolution; and I do hereby admonish all citizens of the United States and every person to abstain from every violation of the provisions of the Joint Resolution above set forth, hereby made applicable to Mexico, and I do hereby warn them that all violations of such provisions will be rigorously prosecuted.

And I do hereby enjoin upon all officers of the United States, charged with the execution of the laws thereof, the utmost diligence in preventing violations of the said Joint Resolution and this my Proclamation issued thereunder, and in bringing to trial and punishment any offenders against the same.

And I do hereby prescribe as an exception and limitation to the foregoing restrictions such exportations of arms or munitions of war as are approved by the Government of the United States, and such arms and munitions for industrial or commercial uses as may from time to time be exported with the consent of the Secretary of State.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this seventh day of January in the year of our Lord one thousand nine hundred and twenty-four and of the Independence of the United States of America the one hundred and forty-eighth.

By the President:

CHARLES E. HUGHES

*Secretary of State.*

CALVIN COOLIDGE.

## 97. THE REORGANIZED FOREIGN SERVICE

Until 1924 our foreign service was sharply differentiated into diplomatic and consular branches. Although the duties of the two branches were to some extent similar and an officer in one branch might display abilities making it desirable to transfer him to the other branch, such transfer was impracticable without the formality of a new appointment. The lack of



uniformity in the salary scale of the two branches was another difficulty in the way of desirable transfers and of effecting greater elasticity and mobility in the service. In order to remedy these difficulties and to effect other reforms in the foreign service, Congress passed the Rogers Act which went into effect on July 1, 1924. This act was an important step in advance toward placing our foreign service upon a more efficient basis. It must not be supposed, however, that any miracle has been suddenly wrought. It may require a decade or two before the salutary results of the Rogers Act will be fully realized. Meanwhile, the men who came into the service under the former regime with its obvious defects are, for the most part, still in the service. The predominance of "career men" in the service has given rise to considerable criticism, among the most searching of which is that in the *New York World* editorial quoted below.

#### a. The Rogers Act

[*U. S. Statutes at Large*, vol. 43, pt. 1, pp. 140-144.]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That hereafter the Diplomatic and Consular Service of the United States shall be known as the Foreign Service of the United States.

SEC. 2. That the official designation "Foreign Service officer" as employed throughout this Act shall be deemed to denote permanent officers in the Foreign Service below the grade of minister, all of whom are subject to promotion on merit, and who may be assigned to duty in either the diplomatic or the consular branch of the Foreign Service at the discretion of the President.

SEC. 3. That the officers in the Foreign Service shall hereafter be graded and classified as follows, with the salaries of each class herein affixed thereto, but not exceeding in number for each class a proportion to the total number of officers in the service represented in the following percentage limitations: Ambassadors and ministers as now or hereafter provided; Foreign Service officers as follows: Class 1, 6 per centum, \$9,000; class 2, 7 per centum, \$8,000; class 3, 8 per centum, \$7,000; class 4, 9 per centum, \$6,000; class 5, 10 per centum, \$5,000; class 6, 14 per centum, \$4,500; class 7, \$4,000; class 8, \$3,500; class 9, \$3,000; unclassified, \$3,000 to \$1,500; *Provided*, That as many Foreign Service officers above class 6 as may be required for the purpose of inspection may be detailed by the Secretary of State for that purpose.

SEC. 4. That Foreign Service officers may be appointed as secretaries in the Diplomatic Service or as consular officers or both; *Provided*, That all such appointments shall be made by and with the advice and consent of the Senate; *Provided further*,

That all official acts of such officers while on duty in either the diplomatic or the consular branch of the Foreign Service shall be performed under their respective commissions as secretaries or as consular officers.

SEC. 5. That hereafter appointments to the position of Foreign Service officer shall be made after examination and a suitable period of probation in an unclassified grade or, after five years of continuous service in the Department of State, by transfer therefrom under such rules and regulations as the President may prescribe: *Provided*, That no candidate shall be eligible for examination for Foreign Service officer who is not an American citizen: *Provided further*, That reinstatement of Foreign Service officers separated from the classified service by reason of appointment to some other position in the Government service may be made by Executive order of the President under such rules and regulations as he may prescribe.

All appointments of Foreign Service officers shall be by commission to a class and not by commission to any particular post, and such officers shall be assigned to posts and may be transferred from one post to another by order of the President as the interests of the service may require: *Provided*, That the classification of secretaries in the Diplomatic Service and of consular officers is hereby abolished, without, however, in any wise impairing the validity of the present commissions of secretaries and consular officers.

SEC. 6. That section 5 of the Act of February 5, 1915 (Public, 242), is hereby amended to read as follows:

"Sec. 5. That the Secretary of State is directed to report from time to time to the President, along with his recommendations, the names of those Foreign Service officers who by reason of efficient service have demonstrated special capacity for promotion to the grade of minister, and the names of those Foreign Service officers and employees and officers and employees in the Department of State who by reason of efficient service, an accurate record of which shall be kept in the Department of State, have demonstrated special efficiency, and also the names of persons found upon taking the prescribed examination to have fitness for appointment to the lower grades of service."

SEC. 7. That on the date on which this Act becomes effective the Secretary of State shall certify to the President, with his recommendation in each case, the record of efficiency of the several secretaries in the Diplomatic Service, consuls general, consuls, vice consuls of career, consular assistants, interpreters, and

student interpreters then in office and shall, except in cases of persons found to merit reduction in rank or dismissal from the service, recommend to the President the recommissioning, without further examination, of those then in office as follows:

Secretaries of class one designated as counselors of embassy, and consuls general of classes one and two as Foreign Service officers of class two.

Secretaries of class one not designated as counselors, consuls general of class four, and consuls general at large as Foreign Service officers of class three.

Secretaries of class two, consuls general of class five, consuls of classes one, two, and three, and Chinese, Japanese, and Turkish secretaries as Foreign Service officers of class four.

Consuls of class four as Foreign Service officers of class five.

Secretaries of class three, consuls of class five, and Chinese, Japanese, and Turkish assistant secretaries as Foreign Service officers of class six.

Consuls of class six as Foreign Service officers of class seven.

Secretaries of class four and consuls of class seven as Foreign Service officers of class eight.

Consuls of classes eight and nine as Foreign Service officers of class nine.

Vice consuls of career, consular assistants, interpreters, and student interpreters as Foreign Service officers, unclassified. . . .

SEC. 12. That the President is hereby authorized to grant to diplomatic missions and to consular offices at capitals of countries where there is no diplomatic mission of the United States representation allowances out of any money which may be appropriated for such purpose from time to time by Congress, the expenditure of such representation allowance to be accounted for in detail to the Department of State quarterly under such rules and regulations as the President may prescribe.

SEC. 13. Appropriations are authorized for the salary of a private secretary to each ambassador who shall be appointed by the ambassador and hold office at his pleasure.

SEC. 14. That any Foreign Service officer may be assigned for duty in the Department of State without loss of class or salary, such assignment to be for a period of not more than three years, unless the public interests demand further service, when such assignment may be extended for a period not to exceed one year. Any Foreign Service officer of whatever class detailed for special duty not at his post or in the Department of State shall be paid his actual and necessary expenses for travel and not exceeding

an average of \$8 per day for subsistence during such special detail: *Provided*, That such special duty shall not continue for more than sixty days, unless in the case of trade conferences or international gatherings, congresses, or conferences, when such subsistence expenses shall run only during the period thereof and the necessary period of transit to and from the place of gathering: *Provided further*, That the Secretary of State is authorized to prescribe a per diem allowance not exceeding \$6, in lieu of subsistence for Foreign Service officers on special duty or Foreign Service inspectors.

SEC. 15. That the Secretary of State is authorized, whenever he deems it to be in the public interest, to order to the United States on his statutory leave of absence any Foreign Service officer who has performed three years or more of continuous service abroad: *Provided*, That the expenses of transportation and subsistence of such officers and their immediate families, in traveling from their posts to their homes in the United States and return, shall be paid under the same rules and regulations applicable in the case of officers going to and returning from their posts under orders of the Secretary of State when not on leave: *Provided further*, That while in the United States the services of such officers shall be available for trade conference work or for such duties in the Department of State as the Secretary of State may prescribe. . . .

SEC. 17. That within the discretion of the President, any Foreign Service officer may be appointed to act as commissioner, charge d'affaires, minister resident, or diplomatic agent for such period as the public interests may require without loss of grade, class, or salary: *Provided, however*, That no such officer shall receive more than one salary.

That section 1685 of the Revised Statutes as amended by the Act entitled "An Act for the improvement of the Foreign Service, approved February 5, 1915," is hereby amended to read as follows:

"Sec. 1685. That for such time as any Foreign Service officer shall be lawfully authorized to act as charge d'affaires ad interim or to assume charge of a consulate general or consulate during the absence of the principal officer at the post to which he shall have been assigned, he shall, if his salary is less than one-half that of such principal officer, receive in addition to his salary as Foreign Service officer compensation equal to the difference between such salary and one-half of the salary provided by law for

the ambassador, minister, or principal consular officer, as the case may be."

SEC. 18. The President is authorized to prescribe rules and regulations for the establishment of a Foreign Service retirement and disability system to be administered under the direction of the Secretary of State. . . .

Approved, May 24, 1924.

## b. Concerning the "Career Men"

[Editorial in *N. Y. World*, Apr. 20, 1928.]

To close students of foreign affairs it is becoming increasingly plain that the existing organization of the State Department and of the foreign service is unequal to the problems with which the United States is confronted in all parts of the world. We embarked some years ago on what looked like a very intelligent experiment. Realizing that diplomacy is a difficult and delicate matter, we proposed to intrust it largely to men who were trained to diplomacy from their early manhood. We began to promote the so-called "career men" to the higher posts abroad and to executive positions in the State Department. It was hoped that we might thus obtain a highly expert and competent foreign service more or less free of patronage and political favoritism.

This new system has been in operation for some years and the results have been very disappointing. It has not done away with favoritism. But what is more important, it has placed grave responsibility upon men who are unsuited to these responsibilities. Since the resignation of Secretary Hughes the career men have played a very big role in American foreign affairs. What does the record show? They handled the Geneva Arms Conference. It was a diplomatic fiasco. They handled Nicaragua until the thing got so muddled that Mr. Stimson had to be called in from the outside to straighten things out a bit. They handled Mexico until at last Mr. Morrow and Mr. Olds took affairs in hand and began to unravel the tangle they had created. In China, had the career diplomats been given a free hand, we should almost certainly have been involved in a bloody and costly adventure. It was nothing but the civilian common sense of Mr. Coolidge and Mr. Kellogg which prevented China from becoming another and much more dangerous Nicaragua.

Experience has shown that, outside the routine work of diplomacy and the ceremonial duties, the career men are not dependable, and that for the serious work of the State Department it is

necessary to look for men in civilian life. What is the reason for this? The reason for it is that a diplomatic career under present conditions is a very bad school of diplomacy. The young aspirant, just out of college, takes his examination and gets an appointment as Third Secretary in some obscure legation. He has very little to do. What he has to do is largely formal and trivial. His associations are almost wholly with the social set in the capital who are furthest removed from the real life and the real problems of their nation. He loses touch with American life. He does not read much. He does not study much. He spends vast amounts of time at dinners and dances and teas and cocktail parties. He dresses very carefully. He learns how to make small talk. He is told off to escort the wives and daughters of visiting bankers, Senators, publishers and business men. And he dreams and yearns and pulls wires in the hope that he will be promoted from Third Secretary in Buenos Aires to Second Secretary in Paris or London.

The notion that this sort of thing constitutes a diplomatic education is very largely a delusion. The career of the career man is heavily insulated against the kind of experience in real affairs which modern diplomacy requires. He acquires the social customs of the upper classes. He absorbs the cosmopolitanism of the international social set. But if he keeps on being a career man until he has reached the age where he has to be appointed chief of a mission, the chances are that he will take up his post without ever having faced the kind of difficulty which a lawyer meets in handling a big case, a business man in handling large affairs, or a politician in handling his party organization.

It is arguable, we think, that our experiment in creating a professional diplomatic service has been based upon a false premise. It is an attempt to imitate the British and the French. But there is this vast difference between European and American Foreign Offices. The British and the French have a great settled tradition in foreign affairs; they have clear conceptions of their place in the world. We haven't. We have, almost inadvertently, become a world power, and we are in a period of the greatest doubt and uncertainty as to what part we shall play as a world power. Our diplomacy is, therefore, not the administration of an established foreign policy which has subtly to be accommodated to new conditions. Our diplomacy is in the stage of discovery, invention, experiment and formulation. For that reason the bureaucratic mind is peculiarly unsuited to guide it.

There are excellent men in our foreign service. Under the

leadership of men of force and capacity they can do very good work. But the system of which they are a part is just the wrong system for developing the kind of wise initiative and flexibility of mind which the really difficult American foreign problems require. For that reason we are very glad to note that Mr. Porter, Chairman of the Foreign Affairs Committee, has introduced a bill which has for its main purpose the increase of civilian influence in the State Department. As to Mr. Porter's particular proposals we have no opinion. But it is most useful that he has made a move which will bring up this whole question for consideration.

## 98. RELATIONS WITH NICARAGUA

The United States has for some time manifested a peculiar interest in the countries of the Caribbean Zone, and in none of those more than in Nicaragua. This interest has extended to actual intervention on several occasions, the most recent being that authorized by President Coolidge. Under his direction, cruisers and marines were sent to Nicaragua late in 1926, during the course of a revolution that seemed about to succeed. The forces of the United States were able to maintain the Conservative government in power against the Liberal revolutionists, and later Mr. Henry L. Stimson, as the personal representative of President Coolidge, secured an agreement on the part of the principal leaders to abandon the revolution on terms that required the further active supervision of Nicaraguan affairs by the United States. The marines continued in occupation of the country during the years 1927-1928, and participated in several bloody engagements with those revolutionists who refused to accept the Stimson terms. President Coolidge in a special message of January 10, 1927, took pains to inform Congress of the state of our relations with Nicaragua at that time, and explained the reasons for his policy of intervention.

### a. Message of President Coolidge

[*Congressional Record*, vol. 68, pp. 1324-1326.]

*To the Congress of the United States:*

While conditions in Nicaragua and the action of this Government pertaining thereto have in general been made public, I think the time has arrived for me officially to inform the Congress more in detail of the events leading up to the present disturbances and conditions which seriously threaten American lives and property, endanger the stability of all Central America, and put in jeopardy the rights granted by Nicaragua to the United States for the construction of a canal. It is well known that in 1912 the United States intervened in Nicaragua with a large force and put down a revolution, and that from that time to 1925

a legation guard of American marines was, with the consent of the Nicaraguan Government, kept in Managua to protect American lives and property. In 1923 representatives of the five Central American countries, namely, Costa Rica, Guatemala, Honduras, Nicaragua, and Salvador, at the invitation of the United States, met in Washington and entered into a series of treaties. These treaties dealt with limitation of armament, a Central American tribunal for arbitration, and the general subject of peace and amity. The treaty last referred to specifically provides in Article II that the Governments of the contracting parties will not recognize any other government which may come into power in any of the five Republics through a coup d'état, or revolution, and disqualifies the leaders of such coup d'état, or revolution, from assuming the presidency or vice presidency. . . .

The United States was not a party to this treaty, but it was made in Washington under the auspices of the Secretary of State, and this Government has felt a moral obligation to apply its principles in order to encourage the Central American States in their efforts to prevent revolution and disorder. The treaty, it may be noted in passing, was signed on behalf of Nicaragua by Emiliano Chamorro himself, who afterwards assumed the presidency in violation thereof and thereby contributed to the creation of the present difficulty. . . .

The Nicaraguan constitution provides in article 106 that in the absence of the President and Vice President the Congress shall designate one of its members to complete the unexpired term of President. As President Solorzano had resigned and was then residing in California, and as the Vice President, Doctor Sacasa, was in Guatemala, having been out of the country since November, 1925, the action of Congress in designating Senor Diaz was perfectly legal and in accordance with the constitution. Therefore the United States Government on November 17 extended recognition to Senor Diaz. . . .

Immediately following the inauguration of President Diaz and frequently since that date he has appealed to the United States for support, has informed this Government of the aid which Mexico is giving to the revolutionists, and has stated that he is unable solely because of the aid given by Mexico to the revolutionists to protect the lives and property of American citizens and other foreigners. When negotiations leading up to the Corinto conference began, I immediately placed an embargo on the shipment of arms and ammunition to Nicaragua. The Department of State notified the other Central American States, to



wit, Costa Rica, Honduras, Salvador, and Guatemala, and they assured the department that they would cooperate in this measure. So far as known, they have done so. The State Department also notified the Mexican Government of this embargo and informally suggested to that government like action. The Mexican Government did not adopt the suggestion to put on an embargo, but informed the American ambassador at Mexico City that in the absence of manufacturing plants in Mexico for the making of arms and ammunition the matter had little practical importance.

As a matter of fact, I have the most conclusive evidence that arms and munitions in large quantities have been on several occasions since August, 1926, shipped to the revolutionists in Nicaragua. Boats carrying these munitions have been fitted out in Mexican ports, and some of the munitions bear evidence of having belonged to the Mexican Government. It also appears that the ships were fitted out with the full knowledge of and, in some cases, with the encouragement of Mexican officials and were in one instance, at least, commanded by a Mexican naval reserve officer. At the end of November, after spending some time in Mexico City, Doctor Sacasa went back to Nicaragua, landing at Puerto Cabezas, near Bragmans Bluff. He immediately placed himself at the head of the insurrection and declared himself President of Nicaragua. He has never been recognized by any of the Central American Republics nor by any other government, with the exception of Mexico, which recognized him immediately. As arms and munitions in large quantities were reaching the revolutionists, I deemed it unfair to prevent the recognized government from purchasing arms abroad, and, accordingly, the Secretary of State has notified the Diaz Government that licenses would be issued for the export of arms and munitions purchased in this country. It would be thoroughly inconsistent for this country not to support the government recognized by it while the revolutionists were receiving arms and munitions from abroad.

During the last two months the Government of the United States has received repeated requests from various American citizens, both directly and through our consuls and legation, for the protection of their lives and property. The Government of the United States has also received requests from the British chargé at Managua and from the Italian ambassador at Washington for the protection of their respective nationals. Pursuant to such requests, Admiral Latimer, in charge of the special

service squadron, has not only maintained the neutral zone at Bluefields under the agreement of both parties but has landed forces at Puerto Cabezas and Rio Grande, and established neutral zones at these points where considerable numbers of Americans live and are engaged in carrying on various industries. He has also been authorized to establish such other neutral zones as are necessary for the purposes above mentioned.

For many years numerous Americans have been living in Nicaragua, developing its industries and carrying on business. At the present time there are large investments in lumbering, mining, coffee growing, banana culture, shipping, and also in general mercantile and other collateral business. All these people and these industries have been encouraged by the Nicaraguan Government. That Government has at all times owed them protection, but the United States has occasionally been obliged to send naval forces for their proper protection. In the present crisis such forces are requested by the Nicaraguan Government, which protests to the United States its inability to protect these interests and states that any measures which the United States deems appropriate for their protection will be satisfactory to the Nicaraguan Government.

In addition to these industries now in existence, the Government of Nicaragua, by a treaty entered into on the 5th day of August, 1914, granted in perpetuity to the United States the exclusive proprietary rights necessary and convenient for the construction, operation, and maintenance of an oceanic canal.

...  
There is no question that if the revolution continues American investments and business interests in Nicaragua will be very seriously affected, if not destroyed. The currency, which is now at par, will be inflated. American as well as foreign bondholders will undoubtedly look to the United States for the protection of their interests.

It is true that the United States did not establish the financial plan by any treaty, but it nevertheless did aid through diplomatic channels and advise in the negotiation and establishment of this plan for the financial rehabilitation of Nicaragua.

Manifestly the relation of this Government to the Nicaraguan situation, and its policy in the existing emergency, are determined by the facts which I have described. The proprietary rights of the United States in the Nicaraguan canal route, with the necessary implications growing out of it affecting the Panama Canal, together with the obligations flowing from the in-

vestments of all classes of our citizens in Nicaragua, place us in a position of peculiar responsibility. I am sure it is not the desire of the United States to intervene in the internal affairs of Nicaragua or of any other Central American Republic. Nevertheless it must be said that we have a very definite and special interest in the maintenance of order and good government in Nicaragua at the present time, and that the stability, prosperity, and independence of all Central American countries can never be a matter of indifference to us. The United States can not, therefore, fail to view with deep concern any serious threat to stability and constitutional government in Nicaragua tending toward anarchy and jeopardizing American interests, especially if such state of affairs is contributed to or brought about by outside influences or by any foreign power. It has always been and remains the policy of the United States in such circumstances to take the steps that may be necessary for the preservation and protection of the lives, the property, and the interests of its citizens and of this Government itself. In this respect I propose to follow the path of my predecessors.

Consequently, I have deemed it my duty to use the powers committed to me to insure the adequate protection of all American interests in Nicaragua, whether they be endangered by internal strife or by outside interference in the affairs of that Republic.

CALVIN COOLIDGE

THE WHITE HOUSE, *January 10, 1927.*

**b. Letter of Henry L. Stimson to General Moncada,  
May 4, 1927**

[*N. Y. Times*, May 7, 1927.]

Dear General Moncada:

Confirming our conversation of this morning, I have the honor to inform you that I am authorized to say that the President of the United States intends to accept the request of the Nicaraguan Government to supervise the elections of 1928; that retention of President Diaz during the remainder of his term is regarded as necessary for the proper and successful conduct of such elections, and that the forces of the United States will be authorized to accept the custody of the arms of those willing to lay them down, including the Government's, and to disarm forcibly those who will not do so.

Very respectfully,

HENRY L. STIMSON.

## CHAPTER XV

### GOVERNMENT OF TERRITORIES AND POSSESSIONS

#### 99. NORTHWEST ORDINANCE

Attention has previously been called to the difficulty of agreeing to the Articles of Confederation on account of the conflicting claims to western lands. This difficulty was solved by the cession of all these lands to the United States, thus giving to the general government the vast domain known as the Northwest Territory. With its acquisition came the problem of providing a government, and several plans were proposed, including one by Jefferson. The result was the enactment, in 1787, of the so-called Northwest Ordinance, which is notable, therefore, as the first act providing a territorial government in the United States. The Northwest Ordinance was continued in effect by the first Congress under the Constitution, and its underlying principles have been generally applied since in the government of territories.

[Text in MacDonald, *Documentary Source-Book of American History, 1606-1926* (The Macmillan Company), pp. 210-216.]

#### *An Ordinance for the government of the territory of the United States northwest of the river Ohio.*

SECTION 1. *Be it ordained by the United States in Congress assembled,* That the said territory, for the purposes of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

[Section 2 relates to the descent and distribution of estates.]

SEC. 3. *Be it ordained by the authority aforesaid,* That there shall be appointed, from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein in one thousand acres of land, while in the exercise of his office.

SEC. 4. There shall be appointed from time to time, by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep

and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings every six months to the Secretary of Congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction, and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

SEC. 5. The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

SEC. 6. The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

SEC. 7. Previous to the organization of the general assembly the governor shall appoint such magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized the powers and duties of the magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

SEC. 8. For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

SEC. 9. So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to

elect representatives from their counties or townships, to represent them in the general assembly: *Provided*, That for every five hundred free male inhabitants there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature: *Provided*, That no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee-simple, two hundred acres of land within the same: *Provided, also*, That a freehold in fifty acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

SEC. 10. The representatives thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

SEC. 11. The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum; and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress, five of whom Congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress, one of whom Congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the time of service of the members of council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress, five of whom

Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.

SEC. 12. [The governor and other officers to take an oath.] As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to Congress who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary government.

SEC. 13. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

SEC. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

#### ARTICLE I

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territories.

#### ARTICLE II

The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course

of common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed.

### ARTICLE III

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

### ARTICLE IV

The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts, contracted, or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress



assembled. The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

#### ARTICLE V

There shall be formed in the said territory not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The western State, in the said territory, shall be bounded by the Mississippi, the Ohio, and the Wabash Rivers; a direct line drawn from the Wabash and Post Vincents, due north, to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last-mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: *Provided, however,* And it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: *Provided,* The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in

these articles, and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

## ARTICLE VI

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: *Provided always*, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.

## 100. INSULAR CASES

The power to govern territory belonging to the United States is clearly vested in Congress. The scope of that power has, however, been the subject of considerable controversy. This has centered especially around the question whether Congress is bound, in its government of such territory, by the ordinary constitutional limitations, a question which has been commonly put in this form: "Does the Constitution follow the flag?" In the *Dred Scott* case, decided in 1857, the Supreme Court held that these constitutional limitations did apply, and that Congress could not therefore prohibit slavery in the territories, since such prohibition would deprive masters of their slave property without the due process guaranteed them by the Constitution.

With the acquisition of territory that resulted from the Spanish-American War, new problems and difficulties arose in the government of these possessions. Several cases came to the Supreme Court, involving again the power of Congress and the application of the Constitution. These are collectively known as the Insular Cases, the most important of which are probably *Downes v. Bidwell* and *Dorr v. United States*.<sup>1</sup> The first of these involved the power to impose duties upon goods imported from Porto Rico, and the second the right to deny jury trial in the Philippines. The Supreme Court, in divided decisions, met these new situations with two novel and interesting doctrines, viz. the classification of territory into incorporated and unincorporated, and the division of the Constitution into formal and fundamental parts. The Court then applied these doctrines in such a way as to uphold the power of Congress in each case.

### a. Doctrine of Incorporated and Unincorporated Territory

[*Downes v. Bidwell* (1901), 182 U. S. 244, 280-287, 338-342, 386-391; 45 L. Ed. 1088, 1103-1106, 1126-1127, 1144-1146.]

Mr. Justice Brown announced the conclusion and judgment of the court: . . .

<sup>1</sup> The other principal cases in this group are: *DeLima v. Bidwell* (1901), 182 U. S. 1; *Dooley v. United States* (1901), 182 U. S. 222; *Dooley v. United States* (1901), 183 U. S. 151; *Fourteen Diamond Rings* (1901), 183 U. S. 176; *Hawaii v. Mankichi* (1903), 190 U. S. 197.

We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the "American empire." There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges, and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States. . . .

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.

We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage (*Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the states to be unnecessary to the proper protection of individuals.

Whatever may be finally decided by the American people as to

the status of these islands and their inhabitants,—whether they shall be introduced into the sisterhood of states or be permitted to form independent governments,—it does not follow that in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States. . . .

We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect. . . .

Patriotic and intelligent men may differ widely as to the desirableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.

We are therefore of opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it

imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.

*The judgment of the Circuit Court is therefore affirmed.*

Mr. Justice White, with whom concurred Mr. Justice Shiras and Mr. Justice McKenna, uniting in the judgment of affirmance:

Mr. Justice Brown, in announcing the judgment of affirmance, has in his opinion stated his reasons for his concurrence in such judgment. In the result I likewise concur. As, however, the reasons which cause me to do so are different from, if not in conflict with, those expressed in that opinion, if its meaning is by me not misconceived, it becomes my duty to state the convictions which control me. . . .

It is, then, as I think, indubitably settled by the principles of the law of nations, by the nature of the government created under the Constitution, by the express and implied powers conferred upon that government by the Constitution, by the mode in which those powers have been executed from the beginning, and by an unbroken line of decisions of this court, first announced by Marshall and followed and lucidly expounded by Taney, that the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation, and that on the other hand, when it has expressed in the treaty the conditions favorable to incorporation they will, if the treaty be not repudiated by Congress, have the force of the law of the land, and therefore by the fulfillment of such conditions cause incorporation to result. It must follow, therefore, that where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions, but expressly provides to the contrary, that incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family. . . .

The result of what has been said [about the treaty with respect to Porto Rico] is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on merchandise coming from Porto Rico into the United States after the cession was within the power of

Congress, and that body was not, moreover, as to such impost, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico. . . .

[Justice Gray filed a separate concurring opinion.]

Mr. Justice Harlan, dissenting: . . .

I reject altogether the theory that Congress, in its discretion, can exclude the Constitution from a domestic territory of the United States, acquired, and which could only have been acquired, in virtue of the Constitution. I cannot agree that it is a domestic territory of the United States for the purpose of preventing the application of the tariff act imposing duties upon imports from foreign countries, but not a part of the United States for the purpose of enforcing the constitutional requirement that *all* duties, imposts, and excises imposed by Congress "shall be uniform throughout the United States." How Porto Rico can be a domestic territory of the United States, as distinctly held in *De Lima v. Bidwell*, and yet, as is now held, not embraced by the words "throughout the United States," is more than I can understand. . . .

It would seem, according to the theories of some, that even if Porto Rico is in and of the United States for many important purposes, it is yet not a part of this country with the privilege of protesting against a rule of taxation which Congress is expressly forbidden by the Constitution from adopting as to any part of the "United States." And this result comes from the failure of Congress to use the word "incorporate" in the Foraker act, although by the same act all power exercised by the civil government in Porto Rico is by authority of the United States, and although this court has been given jurisdiction by writ of error or appeal to re-examine the final judgments of the district court of the United States established by Congress for that territory. Suppose Congress had passed this act: "*Be it enacted by the Senate and House of Representatives in Congress assembled, That Porto Rico be and is hereby incorporated into the United States as a territory,*" would such a statute have enlarged the scope or effect of the Foraker act? Would such a statute have accomplished more than the Foraker act has done? Indeed, would not such legislation have been regarded as most extraordinary as well as unnecessary?

I am constrained to say that this idea of "incorporation" has

some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel.

In my opinion Porto Rico became, at least after the ratification of the treaty with Spain, a part of and subject to the jurisdiction of the United States in respect of all its territory and people, and that Congress could not thereafter impose any duty, impost, or excise with respect to that island and its inhabitants which departed from the rule of uniformity established by the Constitution.

#### b. Doctrine of Formal and Fundamental Constitutional Provisions

[*Dorr v. United States* (1904), 195 U. S. 138, 142-156; 49 L. Ed. 128, 130-135.]

Mr. Justice Day delivered the opinion of the court:

The case presents the question whether, in the absence of a statute of Congress expressly conferring the right, trial by jury is a necessary incident of judicial procedure in the Philippine Islands, where demand for trial by that method has been made by the accused, and denied by the courts established in the islands. . . .

In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise of the power is limited by the "prohibitions" of that instrument. The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in *Downes v. Bidwell*, 182 U. S. 244-288, 45 L. ed. 1088-1106, 21 Sup. Ct. Rep. 770.

Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories, and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.

For this case the practical question is, Must Congress, in establishing a system for the Philippine Islands, carry to their people by proper affirmative legislation a system of trial by jury?

If the treaty-making power could incorporate territory into the United States without congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States [30 Stat. at L. 1759], carefully refrained from so doing; for it is expressly provided that (article 9): "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." In this language it is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly-acquired possessions.

The legislation upon the subject shows that not only has Congress hitherto refrained from incorporating the Philippines into the United States, but in the act of 1902, providing for temporary civil government (32 Stat. at L. 69, chap. 1369), there is express provision that § 1891 of the Revised Statutes of 1878 shall not apply to the Philippine Islands. This is the section giving force and effect to the Constitution and laws of the United States, not locally inapplicable, within all the organized territories, and every territory thereafter organized, as elsewhere within the United States. . . .

It was said in the *Mankichi Case*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, that when the territory had not been incorporated into the United States these requirements were not limitations upon the power of Congress in providing a government for territory in execution of the powers conferred upon Congress. . . .

In the same case Mr. Justice Brown, in the course of his opinion, said:

"We would even go farther, and say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case [right to trial by jury and presentment by grand jury] are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being."

As we have had occasion to see in the case of *Kepner v. United*



*States*, 195 U. S. 100, *ante*, 114, 24 Sup. Ct. Rep. 797, the President, in his instructions to the Philippine Commission, while impressing the necessity of carrying into the new government the guaranties of the Bill of Rights securing those safeguards to life and liberty which are deemed essential to our government, was careful to reserve the right to trial by jury, which was doubtless due to the fact that the civilized portion of the islands had a system of jurisprudence founded upon the civil law, and the uncivilized parts of the archipelago were wholly unfitted to exercise the right of trial by jury. The Spanish system, in force in the Philippines, gave the right to the accused to be tried before judges, who acted in effect as a court of inquiry, and whose judgments were not final until passed in review before the *audiencia*, or superior court, with right of final review, and power to grant a new trial for errors of law, in the supreme court at Madrid. To this system the Philippine Commission, in executing the power conferred by the orders of the President, and sanctioned by act of Congress (act of July 1, 1902, 32 Stat. at L. 691, chap. 1369), has added a guaranty of the right of the accused to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses against him face to face, and to have compulsory process to compel the attendance of witnesses in his behalf. And, further, that no person shall be held to answer for a criminal offense without due process of law, nor be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself. As appears in the *Kepner Case*, 195 U. S. 100, *ante*, 114, 24 Supt. Ct. Rep. 797, the accused is given the right of appeal from the judgment of the court of first instance to the supreme court, and, in capital cases, the case goes to the latter court without appeal. It cannot be successfully maintained that this system does not give an adequate and efficient method of protecting the rights of the accused as well as executing the criminal law by judicial proceedings which give full opportunity to be heard by competent tribunals before judgment can be pronounced. Of course, it is a complete answer to this suggestion to say, if such be the fact, that the constitutional requirements as to a jury trial, either of their own force or as limitations upon the power of Congress in setting up a government, must control in all the territory, whether incorporated or not, of the United States. But is this a reasonable interpretation of the power conferred upon Congress to make rules and regulations for the territories? . . .

If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory belonging to the United States, was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice. Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition.

We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in article 4, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise does not require that body to enact for ceded territory, not made a part of the United States by congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation, and of its own force, carry such right to territory so situated. . . .

[Chief Justice Fuller and Justices Peckham and Brewer filed a concurring opinion, declaring that while they did not themselves believe in the doctrine here stated, they concurred in it because they felt bound by previously decided cases.]

Mr. Justice Harlan, dissenting:

I do not believe now any more than I did when *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, was decided, that the provisions of the Federal Constitution as to grand and petit juries relate to mere methods of procedure,

and are not fundamental in their nature. In my opinion, guaranties for the protection of life, liberty, and property, as embodied in the Constitution, are for the benefit of all, of whatever race or nativity, in the states composing the Union, or in any territory, however acquired, over the inhabitants of which the government of the United States may exercise the powers conferred upon it by the Constitution.

The Constitution declares that *no* person, except in the land or naval forces, shall be held to answer for a capital or otherwise infamous crime, except on the presentment or indictment of a grand jury; and forbids the conviction, in a criminal prosecution, of any person, for any crime, except on the unanimous verdict of a petit jury composed of twelve persons. Necessarily, that mandate was addressed to every one committing crime punishable by the United States. This court, however, holds that these provisions are not fundamental, and may be disregarded in any territory acquired in the manner the Philippine Islands were acquired, although, as heretofore decided by this court, they could not be disregarded in what are commonly called the organized territories of the United States. *Thompson v. Utah*, 170 U. S. 343, 32 L. ed. 1061, 18 Sup. Ct. Rep. 620. I cannot assent to this interpretation of the Constitution. It is, I submit, so obviously inconsistent with the Constitution that I cannot regard the judgment of the court otherwise than as an amendment of that instrument by judicial construction, when a different mode of amendment is expressly provided for. Grand juries and petit juries may be, at times, somewhat inconvenient in the administration of criminal justice in the Philippines. But such inconveniences are of slight consequence compared with the dangers to our system of government arising from judicial amendments of the Constitution. The Constitution declares that it "shall be the supreme law of the land." But the court in effect adjudges that the Philippine Islands are not part of the "land," within the meaning of the Constitution, although they are governed by the sovereign authority of the United States, and although their inhabitants are subject in all respects to its jurisdiction,—as much so as are the people in the District of Columbia or in the several states of the Union. No power exists in the judiciary to suspend the operation of the Constitution in any territory governed, as to its affairs and people, by authority of the United States. As a Filipino committing the crime of murder in the Philippine Islands may be hung by the sovereign authority of the United States, and as the Philippine

Islands are under a civil, not military, government, the suggestion that he may not, of right, appeal for his protection to the jury provisions of the Constitution, which constitutes the only source of the power that the government may exercise at any time or at any place, is utterly revolting to my mind, and can never receive my sanction. . . .

## 101. STATUS OF THE PHILIPPINES

When the Philippine Islands were acquired in 1898, their exact status in the constitutional system of the United States was undetermined, although it was generally presumed that they would be held only temporarily. The Filipinos themselves desired immediate independence, but this was denied them. They were, however, given official assurances from time to time that independence would be accorded as soon as a stable government had been established, the so-called Jones Act of 1916 incorporating that assurance into a statute that gave them also practically complete self-government. President Wilson, at the close of his term, recommended to Congress the fulfillment of these pledges, holding that the conditions laid down had been met. This recommendation was not acted upon by Congress, and special missions sent by Presidents Harding and Coolidge to investigate conditions in the Philippines (the Wood-Forbes and Carmi Thompson missions, respectively) reported the time not yet ripe for independence. President Harding supported this view in replying to a strong plea for independence made by a special Philippine Parliamentary Mission in 1922, as did also President Coolidge in replying to a similar mission in 1924.

### a. Report of the Wood-Forbes Mission

[*House Document No. 325*, 67 Cong., 2 Sess., pp. 45-46.]

#### GENERAL CONCLUSIONS

We find the people happy, peaceful, and in the main prosperous, and keenly appreciative of the benefits of American rule.

We find everywhere among the Christian Filipinos the desire for independence, generally under the protection of the United States. The non-Christians and Americans are for continuance of American control.

We find a general failure to appreciate the fact that independence under the protection of another nation is not true independence.

We find that the Government is not reasonably free from those underlying causes which result in the destruction of government.

We find that a reasonable proportion of officials and employees are men of good character and ability, and reasonably faithful

to the trust imposed upon them; but that the efficiency of the public services has fallen off, and that they are now relatively inefficient, due to lack of inspection and to the too rapid transfer of control to officials who have not had the necessary time for proper training.

We find that many Filipinos have shown marked capacity for government service and that the young generation is full of promise; that the civil service laws have in the main been honestly administered, but there is a marked deterioration due to the injection of politics.

We find there is a disquieting lack of confidence in the administration of justice, to an extent which constitutes a menace to the stability of the government.

We find that the people are not organized economically nor from the standpoint of national defense to maintain an independent government.

We find that the legislative chambers are conducted with dignity and decorum and are composed of representative men.

We feel that the lack of success in certain departments should not be considered as proof of essential incapacity on the part of Filipinos, but rather as indicating lack of experience and opportunity, and especially lack of inspection.

We find that questions in regard to confirmation of appointments might at any time arise which would make a deadlock between the Governor General and the Philippine Senate.

We feel that with all their many excellent qualities, the experience of the past eight years, during which they have had practical autonomy, has not been such as to justify the people of the United States relinquishing supervision of the Government of the Philippine Islands, withdrawing their army and navy, and leaving the islands prey to any powerful nation coveting their rich soil and potential commercial advantages.

In conclusion we are convinced that it would be a betrayal of the Philippine people, a misfortune to the American people, a distinct step backward in the path of progress, and a discreditable neglect of our national duty were we to withdraw from the islands and terminate our relationship there without giving the Filipinos the best chance possible to have an orderly and permanently stable government.

#### RECOMMENDATIONS

1. We recommend that the present general status of the Philippine Islands continue until the people have had time to absorb and thoroughly master the powers already in their hands.

2. We recommend that the responsible representative of the United States, the Governor General, have authority commensurate with the responsibilities of his position. In case of failure to secure the necessary corrective action by the Philippine Legislature, we recommend that Congress declare null and void legislation which has been enacted diminishing, limiting, or dividing the authority granted the Governor General under Act No. 240 of the Sixty-fourth Congress, known as the Jones bill.

3. We recommend that in case of a deadlock between the Governor General and the Philippine Senate in the confirmation of appointments that the President of the United States be authorized to make and render the final decision.

4. We recommend that under no circumstances should the American Government permit to be established in the Philippine Islands a situation which would leave the United States in a position of responsibility without authority.

LEONARD WOOD, *Chairman*.

W. CAMERON FORBES.

October 8, 1921.

### b. Appeal for Philippine Independence

[Letter of Philippine Parliamentary Mission to President Harding, 1922.<sup>1</sup> *Congressional Record*, vol. 62, pt. 9, pp. 9111-9112.]

June 16, 1922.

MR. PRESIDENT:

With the deepest sense of loyalty and confidence in the American people, the Philippine Legislature decided to send the present Parliamentary Mission to the United States. The Mission brings a message of good-will and friendship from the Filipino people to the people of the United States, and is charged to resume the negotiations for the independence of the Philippines begun by the first Mission sent in 1919.

The people of the Philippines yearn to see the fulfilment of their aspirations for national existence. This desire, always strong, has grown with every year.

While the Great War was on, they desisted from active agitation for independence, not because it had become less dear to them, but because they felt the broad issues of freedom and democracy for the world depended upon the outcome of that war, and because their loyalty and affection to the United States

<sup>1</sup> President Harding's reply, as well as the text of this letter, may be found in *The Nation*, vol. 115, pp. 260-265 (Sept. 13, 1922).

bade them lay aside for the moment their own cause for the sake of that which embraced all mankind.

Realizing that the war ideals of America were their own, that the struggle for democracy and the rights of smaller peoples was also their own struggle, they placed all the resources of the islands at the disposal of the United States and offered their sons for the battlefields of Europe. As expressed by the then highest American representative in the Philippines, "Every sentiment, every impulse, every hope of the Filipinos was enlisted in the cause of the United States."

With the ending of the war the Filipino people felt that the principle for which they had contended had triumphed with the triumph of the Allies and the Associated Powers. With hopes renewed and faith strengthened, they resumed the work for their own cause. Hence, on March 8, 1919, the Philippine Legislature approved what was officially known as the "Declaration of Purposes," which remains today an official authoritative pronouncement of the people on what should be their attitude toward, and relations with, the United States.

The Philippine Legislature declared that the "stable government" required in the preamble of the Jones Law as the only prerequisite to independence had already been established in the Philippines; hence "a full and final exchange of views between the United States of America and the Philippine Islands" was deemed necessary. The time had come for the fulfilment of the American pledge. The First Philippine Mission was asked to "convey to the Government of the United States the frankest assurances of the good-will, friendship, and gratitude of the Filipino people and to submit with as much respect as confidence the question of Philippine Independence with a view to its final settlement."

When the First Mission reached the United States, however, it found the American people and Government still absorbed in their international problems. The President was in Europe negotiating the Treaty of Versailles; but, realizing that the fulfilment of the American obligations toward the Philippines could not be delayed any longer, he requested the Secretary of War to receive the Mission in his behalf and expressed the belief that the end was almost in sight of the work undertaken in the islands by Americans and Filipinos.

Soon thereafter, when the American people and Government had been relieved of many of their pressing international burdens and distractions, the petition of the Philippine Legislature,

through the Philippine Mission, received the favorable indorsement of the administration in Washington. President Wilson, in his message to Congress on December 2, 1920, officially recognized the fulfilment of the only condition required of the Philippines as a prerequisite to a separate national existence—a stable government—and formally recommended the immediate granting of independence. He said: "Allow me to call your attention to the fact that the people of the Philippine Islands have succeeded in maintaining a stable government since the last action of the Congress in their behalf, and thus have fulfilled the condition set by the Congress as precedent to a consideration of granting independence to the islands. I respectfully submit that this condition precedent having been fulfilled, it is now our liberty and our duty to keep our promise to the people of those islands by granting them the independence which they so honorably covet."

This recommendation was made after the highest representative of America in the Philippines, the Governor-General, had officially certified both to Congress and to the President of the United States that a stable government had already been established in the islands.

It is a fact, therefore, that immediately prior to the coming into power of the present administration, the Philippine question was on the eve of solution. The solemn covenant, as the author of the Jones Law had called it, between the American and the Filipino peoples was about to be fulfilled. The Philippine Legislature had declared that there was a stable government in the Philippines, and the highest magistrate of the United States and the American representative in the Philippines concurred in the view.

We beg to submit that the fifteen months that have elapsed since the new administration assumed office have not altered the situation. The same stable government exists. Contrary to what some may aver, the phrase, "a stable government," does not convey a vague and indefinite condition. It has a specific and well-established meaning. The international relations of the United States for the last century and a half, especially her dealings with the South American countries, bear this statement out.

President McKinley, in addressing the Cuban people, defined a stable government as one "capable of maintaining order and observing its international obligations, insuring peace and tranquillity and the security of its citizens as well as our own." It must be remembered that the term "stable government" in



the Jones Law had been adopted directly from the American promises to the Cuban people. It cannot, therefore, but have the same meaning. It is worth noting that recently a similar interpretation has been given to that phrase by the League of Nations.

No American official, whether of the past or the present administration, has denied the statement of the Philippine Legislature, the certificate of the Governor-General, and the finding of the President of the United States to the effect that we have established the "stable government" required by the Jones Law, in accordance with the interpretation the universal usage has assigned to these words. Even the report of the Wood-Forbes Mission, which is unwarrantably severe and critical, does not deny this assertion.

There are apparently in President McKinley's estimate two main elements in a stable government: First, ability to maintain order and insure peace and tranquillity and the security of citizens, and, second, ability to observe international obligations. To those two elements, Mr. Root, in his instructions for the Cuban people, added the following: It must rest upon the peaceful suffrages of the people and must contain constitutional limitations to protect the people from the arbitrary actions of the Government. All these elements are to be found in the Philippines today!

It is admitted by the Wood-Forbes Mission that order has been properly maintained and that our insular police or constabulary "has proved itself to be dependable and thoroughly efficient" (p. 23 of the report). The tranquillity and security of the citizens are not jeopardized. "They are naturally an orderly people" (p. 19), said the report.

As to obligations for international life, the Wood-Forbes Mission recognizes that there are people in our service that would do credit to any government. "We find that the legislative chambers are conducted with dignity and decorum and are composed of representative men" (p. 45), observed the Wood-Forbes report.

The Filipino people are by nature and tradition hospitable and courteous to foreigners. There has been no anti-foreign agitation or outbreak. The business of foreigners has been amply protected and will continue to be so protected under an independent Philippines. During the short-lived Philippine Republic, prisoners of war were treated according to the law of nations, and there was security for foreigners.

The insular, provincial, and municipal governments of the Philippines rest on the free and peaceful suffrage of the people. The people elect members of the insular legislature, provincial governors, members of the provincial boards, municipal presidents and members of the municipal councils. Speaking of the elections of 1916, the report said: "Interest in the elections was widespread and election day passed without any serious disturbances. There was a general, quiet acceptance by the minority of the results of the popular vote . . ." (p. 42). The elections held a few days ago, though vigorously contested, have again demonstrated the capacity of the Filipino people for the orderly exercise of popular franchise.

The structure and workings of our government also conform to the standard defined by Mr. Root, in that it is "subject to the limitations and safeguards which the experience of a constitutional government has shown to be necessary to the preservation of individual rights." The Filipino people fought for such constitutional safeguards during the Spanish régime. A modern bill of rights was inserted in the Constitution of the Philippine Republic. Our present constitutional limitations and safeguards have been in operation since 1900, when President McKinley, in his instructions to the second Philippine Commission, set down as inviolable rules the fundamental provisions of the American Bill of Rights. These provisions, with slight modification, were later included in the Organic Act of 1902, and again set forth in the Jones Law of 1916. For more than twenty years, therefore, the Philippine Government has been subject to constitutional practices. They are imbedded in the political life of the people, and, no matter what political change may occur in the Philippines, they will find no material alteration. An impartial judiciary is there to enforce them.

"The Supreme Court," said the Wood-Forbes report, "has the respect and confidence of the Filipino people" (p. 24). The courts of first instance, mostly presided over by Filipinos ever since 1914, have maintained a standard which, in general, compares favorably with the State courts of the Union. From August 31, 1911, to September 1, 1913, during the last two years of Governor Forbes's administration, only 25.1 per cent of the decisions appealed from these courts were reversed by the Supreme Court. From March 3, 1919, to March 4, 1921, another period of two years with Filipinos in control, the percentage of reversals was decreased to 20.8 per cent. The number of cases disposed of by the courts of first instance for the eight

years (1906 to 1913, inclusive) was as much as 82,528. The total number of cases disposed of for the same length of time, with Filipinos in greater control (1914 to 1921, inclusive), was 117,357, or an increase of 34,829, or 42 per cent.

Philippine autonomy has also increased in the agencies of social and political progress, such as schools, roads, public buildings, hospitals, etc. In 1913, when the Filipino people had even less share in the government than they have now, there were enrolled in the public schools 440,050 pupils; in 1921 there were nearly a million (943,422). In 1913 there were only 2,934 public schools; in 1920 there were 5,944. In 1913 there were 2,171 kilometers of first-class roads in operation; in 1921 the figure was 4,698.8, in addition to about 5,000 kilometers of second-class roads. In 1913 there were no dispensaries where the poor could be given medical treatment; in 1921 there were over 800. In 1913 the appropriation for medical aid to the poor was P1,548,317.25; in 1921 the sum was P3,153,828.

Social and economic progress has also been tremendous during this period. In 1913 there were hardly a dozen women's clubs, in 1921 there was 342 in active work. In 1913 the volume of Philippine commerce was only P202,171,484; in 1920 it swelled to P601,124,276. The cultivated area in 1913 was 2,361,483 hectares, as compared with 3,276,942 hectares in 1920, or 38.7 per cent increase. The present conditions in the Philippines, even as alleged in the Wood-Forbes report, compare favorably with those existing in many nations whose right to national sovereignty is not open to the least question.

These are incontrovertible facts which no impartial witness can deny.

The present Parliamentary Mission in which all political parties of the Philippine Islands are represented—the two wings of the Nationalist Party on the one hand and the Democratic Party on the other—has been sent by the Philippine Legislature to ask for immediate, complete, and absolute independence of the Philippines. This desire is not born of ingratitude toward the United States, nor does it show lack of appreciation of the risks and dangers of international life. It is the logical outcome of more than twenty years of patient labors jointly undertaken by the Americans and Filipinos. The Filipino people firmly believe that the time has come when this question should be settled once for all. Further delay in the fulfilment of America's pledge contained in the Jones Law will only result in injury to the best interests of both peoples.

Three years ago the impression of the members of the first Philippine Mission was that the main objection in the minds of many Americans to the immediate independence of the Philippines was the danger of foreign aggression. While this is entirely outside of the question as to whether we have complied with the requirements of the Jones Law, it may not be amiss to call the attention of those Americans to the great change in international affairs which has taken place since the visit of the last Mission.

Wholesome relationship has especially been established in the Pacific area. The recent Washington Conference has cleared away many doubts and misgivings.

Surely, after that conference has been hailed the world over as a solid foundation for international peace, the United States cannot, without showing lack of faith in her own work, now say that she will not grant independence to the Philippines for fear of foreign hostile designs.

In the words of the President of the United States, that conference was called "to provide some means whereby just, thoughtful, righteous peoples, who are not seeking to seize something which does not belong to them, can live peaceably together and eliminate cause of conflict." While the Filipino people realize that the international situation is not a necessary part of the condition prescribed in the Jones Law as a prerequisite to independence, they crave the distinction of becoming the first nation to take advantage of the new order of things brought about by the Washington Conference.

To the favorable international atmosphere may be added the fact that the first of colonial Powers is already reversing her former policies. She has granted recognition of freedom and equality to peoples hitherto held as subjects and vassals. Egypt has regained her independence. The Irish people have been asked to enter into an agreement with England looking to the establishment of a free state. Liberal institutions are now being established in India.

We see in all these events the gradual triumph of American ideals, especially of that fundamental American principle that declared that governments derive their just powers from the consent of the governed.

Hence we come to America in the full expectation that the United States can do no less than other nations have done to their dependencies; that she cannot now refrain from practicing those principles which were initiated by her and followed by

her sister nations; that she cannot now refuse specific realization of those purposes and ideals, which found eloquent expression in her spokesmen both in times of war and in times of peaceful reconstruction; and that she will make the Filipino people a determining factor in the relationship that should exist between the United States and the only unincorporated and subject country now under the American flag.

We, therefore, submit our case, with faith and confidence, frankly and without evasion. It is the case of the Filipino people whom in fact and in law we represent; for certainly under the present circumstances no other agency can speak or act with as much authority on what the Filipino people want or on Filipino conditions in general, as their duly accredited representatives. That is the very essence of representative government.

We reiterate that the present is the time for the United States completely to discharge its obligations to the Philippines. The Filipino people have fulfilled their part in the covenant with America. Their relations with the United States are of the most cordial and friendly nature. If the independence of the Philippines could now be secured as an amicable agreement between the two peoples, nay, even as an act of magnanimity on the part of a sovereign Power, how much would that mean for the peace of the world! How much more would that add to the prestige of the United States when she again appears before the world as a champion of democracy and human liberty!

Very respectfully,

MANUEL L. QUEZON, chairman on the part of the Senate

SERGIO OSMENA, chairman on the part of the House of Representatives

JORGE B. VARGAS, secretary.

[The letter is signed also by 14 others.]

## 102. DISTRICT OF COLUMBIA

During the period of the Confederation, and while sitting at Philadelphia, Congress was at one time nearly mobbed by groups of dissatisfied soldiers. This and other occurrences emphasized the necessity of locating the seat of the federal government within a region completely subject to the control of that government. Upon the adoption of the new Constitution, the states of Maryland and Virginia ceded to the United States a tract of land approximately ten miles square, lying on both sides of the Potomac River, and since known as the District of Columbia. In 1846 the portion lying on the Virginia side was ceded to that state, the District consisting therefore of approximately 70 square miles, including within it the city of Washington and the surrounding suburban areas. Under its power of

exclusive legislation for this region Congress has established different forms of government at various times. From 1790 until 1802, there was a board of three commissioners appointed by the President. In 1802 a mayor-council form of government was provided, with an elective council, and a mayor at first appointed by the President, later (1812) made elective by the council, and in 1820 elective by the people. In 1871, the charters of Washington and of the older city of Georgetown were both revoked, and the District of Columbia made a single municipality; its government consisted of a governor and other officers appointed by the President, a bicameral legislative assembly elected by the people, and a delegate in Congress also popularly elected. In 1874, this form of government was abolished, and a temporary government was established, consisting of three commissioners appointed by the President. In 1878 this temporary form was, in effect, made permanent by the so-called Organic Act of that year.

[Organic Act of 1878. *U. S. Statutes*, vol. 20, pp. 102-108.]

An act providing a permanent form of government for the District of Columbia.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all the territory which was ceded by the State of Maryland to the Congress of the United States for the permanent seat of the government of the United States shall continue to be designated as the District of Columbia. Said District and the property and persons that may be therein shall be subject to the following provisions for the government of the same, and also to any existing laws applicable thereto not hereby repealed or inconsistent with the provisions of this act. The District of Columbia shall remain and continue a municipal corporation, as provided in section two of the Revised Statutes relating to said District, and the Commissioners herein provided for shall be deemed and taken as officers of such corporation; and all laws now in force relating to the District of Columbia not inconsistent with the provisions of this act shall remain in full force and effect.

SEC. 2. That within twenty days after the approval of this act the President of the United States, by and with the advice and consent of the Senate, is hereby authorized to appoint two persons, who, with an officer of the Corps of Engineers of the United States Army, whose lineal rank shall be above that of captain, shall be Commissioners of the District of Columbia, and who, from and after July first, eighteen hundred and seventy-eight, shall exercise all the powers and authority now vested in the Commissioners of said District, except as are hereinafter limited or provided, and shall be subject to all restrictions and

limitations and duties which are now imposed upon said Commissioners. The Commissioner who shall be an officer detailed, from time to time, from the Corps of Engineers, by the President, for this duty, shall not be required to perform any other, nor shall he receive any other compensation than his regular pay and allowances as an officer of the Army. The two persons appointed from civil life shall, at the time of their appointment, be citizens of the District of Columbia for three years next before their appointment, and have, during that period, claimed residence nowhere else, and one of said three Commissioners shall be chosen president of the Board of Commissioners at their first meeting, and annually and whenever a vacancy shall occur, thereafter. . . .

SEC. 3. That as soon as the Commissioners appointed and detailed as aforesaid shall have taken and subscribed the oath or affirmation hereinbefore required, all the powers, rights, duties, and privileges lawfully exercised by, and all property, estate, and effects now vested by law in the Commissioners appointed under the provisions of the act of Congress approved June twentieth, eighteen hundred and seventy-four, shall cease and determine [*sic*]. And the Commissioners of the District of Columbia shall have power, subject to the limitations and provisions herein contained, to apply the taxes or other revenues of said District to the payment of the current expenses thereof, to the support of the public schools, the fire department, and the police, and for that purpose shall take possession and supervision of all the offices, books, papers, records, moneys, credits, securities, assets, and accounts belonging or appertaining to the business or interests of the government of the District of Columbia, and exercise the duties, powers, and authority aforesaid; but said Commissioners, in the exercise of such duties, powers, and authority, shall make no contract, nor incur any obligation other than such contracts and obligations as are hereinafter provided for and shall be approved by Congress. . . . And said Commissioners are hereby authorized to abolish any office, to consolidate two or more offices, reduce the number of employees, remove from office, and make appointments to any office under them authorized by law. . . . The said Commissioners shall submit to the Secretary of the Treasury for the fiscal year ending June thirtieth, eighteen hundred and seventy-nine, and annually thereafter, for his examination and approval, a statement showing in detail the work proposed to be undertaken by them during the fiscal year next ensuing, and the estimated cost thereof; also

the cost of constructing, repairing, and maintaining all bridges authorized by law across the Potomac River within the District of Columbia, and also all other streams in said District; the cost of maintaining all public institutions of charity, reformatories, and prisons belonging to or controlled wholly or in part by the District of Columbia, and which are now by law supported wholly or in part by the United States or District of Columbia; and also the expenses of the Washington Aqueduct and its appurtenances; and also an itemized statement and estimate of the amount necessary to defray the expenses of the government of the District of Columbia for the next fiscal year. . . . To the extent to which Congress shall approve of said estimates, Congress shall appropriate the amount of fifty per centum thereof; and the remaining fifty per centum of such approved estimates shall be levied and assessed upon the taxable property and privileges in said District other than the property of the United States and of the District of Columbia. . . .

SEC. 12. That it shall be the duty of the said Commissioners to report to Congress at the next session succeeding their appointment a draft of such additional laws or amendments to existing laws as in their opinion are necessary for the harmonious working of the system hereby adopted, and for the effectual and proper government of the District of Columbia; and said Commissioners shall annually report their official doings in detail to Congress on or before the first Monday of December. . . .

Approved, June 11, 1878.

### 103. FINANCIAL ADMINISTRATION OF SANTO DOMINGO

For a considerable period the United States has maintained an active interest in the affairs of the several countries in the Caribbean zone, and has exercised a form of control over the actual government and administration of those countries, although they remain nominally independent. Santo Domingo, for example, had numerous revolutionary disturbances and seemed unable to pay its debts, with the result that there were threats of foreign intervention. In order to prevent such intervention by European powers, President Roosevelt secured the negotiation of a protocol in 1905, by which the United States was particularly to assume control of customs collections in Santo Domingo. The Senate refused to ratify this protocol, but it was nevertheless put into effect by President Roosevelt through a so-called *modus vivendi* entered into the same year with the Dominican government. Finally, in 1907, the Senate ratified a slightly modified treaty, incorporating the same terms as the earlier protocol. Somewhat similar agreements have since been entered into with other countries, such as Haiti and Nicaragua, by which the United States has



an important part in their actual government and administration. The following selections indicate the methods and types of control exercised.

a. Preliminary Negotiation for Control of Santo Domingo

[Minister Dawson to Secretary of State Hay. *Foreign Relations of the United States, 1905*, pp. 298-300.]

AMERICAN LEGATION,

No. 100.]

*Santo Domingo, January 2, 1905.*

SIR: I have the honor to confirm your telegram, as follows:

Washington, *December 30, 1904.*

DAWSON, *Minister, Santo Domingo:*

Confidential. You will sound the President of Santo Domingo, discreetly but earnestly and in a perfectly friendly spirit, touching the disquieting situation which is developing owing to the pressure of other governments having arbitral awards in their favor and who regard our award as conflicting with their rights. Already one European Government strongly intimates that it may resort to occupation of some Dominican customs ports to secure its own payment. There appears to be a concert among them. You will ascertain whether the Government of Santo Domingo would be disposed to request the United States to take charge of the collection of duties and effect an equitable distribution of the assigned quotas among the Dominican Government and the several claimants. We have grounds to think that such arrangement would satisfy the other powers, besides serving as a practical guaranty of the peace of Santo Domingo from external influence or internal disturbance.

HAY.

and to say that I immediately called upon President Morales.

We entered upon a full and friendly discussion of the international relations and internal politics of this country as affected by its financial obligations, in the course of which I did not disguise from him my conviction that the European creditors would wait no longer for their money. He frankly answered that such was his own conviction and that he was daily expecting a European demand, backed by a war vessel, and a demand from me for the four northern ports under the Improvement award. He clearly realizes that the European creditors will accept no guaranty he can offer, and each would insist on having the full annual amount provided for its own protocol, leaving him nothing, or next to nothing, to run the administration. He said that personally he had long been of the opinion that the best solution was for the

United States to take charge of the collection of the revenues, guaranteeing the Dominican Government enough to live on and arranging with the creditors.

I asked him if he was prepared to make, in the name of his government, a request that my government undertake this task. He answered that he was almost ready; that the opposition to American intervention within his cabinet and among his prominent supporters had much diminished in the last two weeks; Minister Velasquez had despaired of carrying out his own plan; the arrangement at Monte Christi was not working well; it had been proposed in the last cabinet meeting to ask the United States to take charge of that port.

I told him I could not recommend such a proposition to my government; that if we were forced to ask for more ports under the award it would be for Sanchez and Samana, as well as Monte Christi; that I appreciated how great were the political difficulties he was struggling against—difficulties which arose from the deeply grounded prejudice against any sort of American intervention existing among some of his supporters—but that it was for him and not me to say if he had succeeded in removing that prejudice, or if the time had come for him to act in spite of it.

He then asked me to make a written proposition, stating the proportion or amount that I would recommend to be allowed for administrative expenses of the Dominican Government. I begged him to excuse me from doing so, and suggested that the first step had better be a proposition from the Dominican Government, embodying the principle of American collection on a basis that seemed to him just and practicable. He agreed, and said that his own idea was 40 per cent for the creditors and 60 per cent to the Dominican Government.

I expressed some doubts as to whether my government could reach an arrangement with the creditors if limited to such a sum, but agreed to submit it as a tentative proposition as soon as his doubts as to the attitude of his anti-American supporters should be cleared up. Thereupon he asked me to talk with Joubert and Velasquez, with a view to emphasizing the impression already made by the former on the latter's mind. The President said that if Velasquez could be brought to agree, Velasquez and Caceres would follow. Joubert had already half convinced him that the American Government had no selfish or ulterior views in this matter, and an interview with me would tend to convince him further that an American intervention in the custom-houses would be conducted in a manner that would

offend Dominican pride as little as possible and not destroy the prerogatives of the office of minister of finance.

Accordingly, in the last three days, I have had several interviews with the President, Joubert, Velasquez, and Sanchez, and this morning I felt justified in sending you the telegram which I hereby confirm:

SANTO DOMINGO, *January 2, 1905.*

SECSTATE, *Washington:*

Dominican President disposed to request United States take charge of collecting all customs on the following conditions: Distribute 40 per cent annual receipts among all creditors—remaining 60 to the Dominican Government.

DAWSON.

In the course of these interviews I have been obliged to reject several suggestions which seemed to be inadmissible. The first was that I should commit myself personally in favor of the proposed division of the revenues—40 per cent and 60 per cent. I remain free to suggest, either personally or officially, if I should be so instructed, either a different percentage or minimum sums for creditors and government, respectively, with a percentage division of the excess.

The second suggestion was that an assurance be given that Mr. Abbott would not be placed in charge. I immediately inquired if the Dominican Government had any ground of complaint as to Mr. Abbott's administration of Puerto Plata. They answered in the negative, only saying that some officials found it difficult to get along with him. The suggestion was promptly withdrawn. Apart from other considerations which led me to assume a firm position on this point was the fact that I deemed it wise to take the first opportunity of impressing upon them that we would not take the responsibility involved unless given a free hand to back up our representatives in enforcing a rigidly impartial administration of the custom-houses.

The third suggestion comes from Minister Velasquez alone. For the purpose of "saving face" and soothing patriotic pride, he insists upon a joint control of each custom-house by representatives of the two governments, but he has not yet made his plan intelligible to me. In fact it is still shadowy in his own mind. I told him we certainly could not accept a responsibility unless we were given a real and effective control of the collections, although personally I was not only willing but anxious to leave the Dominican Government with the maximum of administra-

tive freedom consistent with this essential prerequisite. He asked me to consider carefully a draft of a plan which he will prepare and submit day after to-morrow. I fear I shall have serious trouble with him on this point, but by consenting to the sending of my telegram to you this morning he has committed himself to the principle of American intervention, and the President feels sure he can hold him in line.

Caceres has been sent for and Joubert will stay over this steamer to aid in holding the Horacista party together in this crisis.

I have, etc.,

T. C. DAWSON.

### b. Treaty with Santo Domingo, 1907

[*Foreign Relations of the United States, 1907*, pt. 1, pp. 308-309.]

. . . . .

The Dominican Government, represented by its minister of state for foreign relations, Emiliano Tejera, and its minister of state for finance and commerce, Federico Velasquez H., and the United States Government, represented by Thomas C. Dawson, minister resident and consul-general of the United States to the Dominican Republic, have agreed:

I. That the President of the United States shall appoint a general receiver of Dominican customs, who, with such assistant receivers and other employees of the receivership as shall be appointed by the President of the United States in his discretion, shall collect all the customs duties accruing at the several customs houses of the Dominican Republic until the payment or retirement of any and all bonds issued by the Dominican Government in accordance with the plan and under the limitations as to terms and amounts hereinbefore recited; and said general receiver shall apply the sums so collected, as follows:

First, to paying the expenses of the receivership; second, to the payment of interest upon said bonds; third, to the payment of the annual sums provided for amortization of said bonds, including interest upon all bonds held in sinking fund; fourth, to the purchase and cancellation or the retirement and cancellation, pursuant to the terms thereof, of any of said bonds as may be directed by the Dominican Government; fifth, the remainder to be paid to the Dominican Government.

The method of distributing the current collections of revenue

in order to accomplish the application thereof as hereinbefore provided shall be as follows:

The expenses of the receivership shall be paid by the receiver as they arise. The allowances to the general receiver and his assistants for the expenses of collecting the revenues shall not exceed five per cent unless by agreement between the two Governments.

On the first day of each calendar month the sum of \$100,000 shall be paid over by the receiver to the fiscal agent of the loan, and the remaining collection of the last preceding month shall be paid over to the Dominican Government, or applied to the sinking fund for the purchase or redemption of bonds, as the Dominican Government shall direct.

*Provided*, That in case the customs revenues collected by the general receiver shall in any year exceed the sum of \$3,000,000, one-half of the surplus above such sum of \$3,000,000 shall be applied to the sinking fund for the redemption of bonds.

II. The Dominican Government will provide by law for the payment of all customs duties to the general receiver and his assistants, and will give to them all needful aid and assistance and full protection to the extent of its powers. The Government of the United States will give to the general receiver and his assistants such protection as it may find to be requisite for the performance of their duties.

III. Until the Dominican Republic has paid the whole amount of the bonds of the debt its public debt shall not be increased except by previous agreement between the Dominican Government and the United States. A like agreement shall be necessary to modify the import duties, it being an indispensable condition for the modification of such duties that the Dominican Executive demonstrate and that the President of the United States recognize that, on the basis of exportations and importations to the like amount and the like character during the two years preceding that in which it is desired to make such modification, the total net customs receipts would at such altered rates of duties have been for each of such two years in excess of the sum of \$2,000,000 United States gold.

IV. The accounts of the general receiver shall be rendered monthly to the contaduria general of the Dominican Republic and to the State Department of the United States and shall be subject to examination and verification by the appropriate officers of the Dominican and the United States Governments.

V. This agreement shall take effect after its approval by the

Senate of the United States and the Congress of the Dominican Republic.

Done in four originals, two being in the English language, and two in the Spanish, and the representatives of the high contracting parties signing them in the city of Santo Domingo this 8th day of February, in the year of our Lord 1907.

THOMAS C. DAWSON.

EMILIANO TEJERA.

FEDERICO VELASQUEZ H.

**PART II**

**STATE AND LOCAL GOVERNMENT**





## CHAPTER XVI

### THE STATES AND THE UNION

#### 104. ADMISSION OF STATES INTO THE UNION

While the Constitution of the United States gives to Congress the right to admit new states into the Union, that instrument does not determine the procedure to be followed. Usually, a territory has petitioned Congress to pass an "enabling act" authorizing the holding of a convention within the territory for the purpose of drawing up a proposed state constitution. If this constitution is satisfactory to Congress, that body then passes an act admitting it to statehood in the Union. If the constitution is unsatisfactory to Congress, the territory has to make such changes in it as Congress may demand. Ordinarily, Congress admits one state at a time. On February 22, 1889, however, it passed an omnibus act looking toward the division of the Territory of Dakota into North and South Dakota and the admission of the two territories as well as the territories of Montana and Washington into the Union as states.

[Omnibus Enabling Act of 1889. *U. S. Statutes*, vol. 25, pp. 676-684.]

CHAP. 180.—An act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

SEC. 2. The area comprising the Territory of Dakota shall, for the purposes of this act, be divided on the line of the seventh standard parallel produced due west to the western boundary of said Territory; and the delegates elected as hereinafter provided to the constitutional convention in districts north of said parallel shall assemble in convention, at the time prescribed in this act,

at the city of Bismarck, and the delegates elected in districts south of said parallel shall, at the same time, assemble in convention at the city of Sioux Falls.

SEC. 3. That all persons who are qualified by the laws of said Territories to vote for representatives to the legislative assemblies thereof, are hereby authorized to vote for and choose delegates to form conventions in said proposed States; and the qualifications for delegates to such conventions shall be such as by the laws of said Territories respectively persons are required to possess to be eligible to the legislative assemblies thereof; and the aforesaid delegates to form said conventions shall be apportioned within the limits of the proposed States, in such districts as may be established as herein provided, in proportion to the population in each of said counties and districts, as near as may be, to be ascertained at the time of making said apportionments by the persons hereinafter authorized to make the same, from the best information obtainable, in each of which districts three delegates shall be elected, but no elector shall vote for more than two persons for delegates to such conventions; that said apportionments shall be made by the governor, the chief-justice, and the secretary of said Territories; and the governors of said Territories shall, by proclamation, order an election of the delegates aforesaid in each of said proposed States, to be held on the Tuesday after the second Monday in May, eighteen hundred and eighty-nine, which proclamation shall be issued on the fifteenth day of April, eighteen hundred and eighty-nine; and such election shall be conducted, the returns made, the result ascertained, and the certificates to persons elected to such convention issued in the same manner as is prescribed by the laws of the said Territories regulating elections therein for Delegates to Congress; and the number of votes cast for delegates in each precinct shall also be returned. The number of delegates to said conventions respectively shall be seventy-five; and all persons resident in said proposed States, who are qualified voters of said Territories as herein provided, shall be entitled to vote upon the election of delegates, and under such rules and regulations as said conventions may prescribe, not in conflict with this act, upon the ratification or rejection of the constitutions.

SEC. 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and, after organization,

shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and State governments for said proposed States, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said States:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of said States shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said States shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe.

Third. That the debts and liabilities of said Territories shall be assumed and paid by said States, respectively.

Fourth. That provision shall be made for the establishment

and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control.

. . . . .

SEC. 8. That the constitutional convention which may assemble in South Dakota shall provide by ordinance for resubmitting the Sioux Falls constitution of eighteen hundred and eighty-five, after having amended the same as provided in section five of this act, to the people of South Dakota for ratification or rejection at an election to be held therein on the first Tuesday in October, eighteen hundred and eighty-nine; but if said constitutional convention is authorized and required to form a new constitution for South Dakota it shall provide for submitting the same in like manner to the people of South Dakota for ratification or rejection at an election to be held in said proposed State on the said first Tuesday in October. And the constitutional conventions which may assemble in North Dakota, Montana, and Washington shall provide in like manner for submitting the constitutions formed by them to the people of said proposed States, respectively, for ratification or rejection at elections to be held in said proposed States on the said first Tuesday in October. At the elections provided for in this section the qualified voters of said proposed States shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said Territories, who, with the governor and chief-justice thereof, or any two of them, shall canvass the same; and if a majority of the legal votes cast shall be for the constitution the governor shall certify the result to the President of the United States, together with a statement of the votes cast thereon and upon separate articles or propositions, and a copy of said constitution, articles, propositions, and ordinances. And if the constitutions and governments of said proposed States are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed States which have adopted constitutions and formed State governments as herein provided shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation.

SEC. 9. That until the next general census, or until otherwise

provided by law, said States shall be entitled to one Representative in the House of Representatives of the United States, except South Dakota, which shall be entitled to two; and the Representatives to the Fifty-first Congress, together with the governors and other officers provided for in said constitutions, may be elected on the same day of the election for the ratification or rejection of the constitutions; and until said State officers are elected and qualified under the provisions of each constitution and the States, respectively, are admitted into the Union, the Territorial officers shall continue to discharge the duties of their respective offices in each of said Territories.

SEC. 24. That the constitutional conventions may, by ordinance, provide for the election of officers for full State governments, including members of the legislatures and Representatives in the Fifty-first Congress; but said State governments shall remain in abeyance until the States shall be admitted into the Union, respectively, as provided in this act. In case the constitution of any of said proposed States shall be ratified by the people, but not otherwise, the legislature thereof may assemble, organize, and elect two Senators of the United States; and the governor and secretary of state of such proposed State shall certify the election of the Senators and Representatives in the manner required by law; and when such State is admitted into the Union, the Senators and Representatives shall be entitled to be admitted to seats in Congress, and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States; and the officers of the State governments formed in pursuance of said constitutions, as provided for the constitutional conventions, shall proceed to exercise all the functions of such State officers; and all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this act or by the constitutions of the States, respectively.

SEC. 25. That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said Territories or by Congress, are hereby repealed.

Approved, February 22, 1889.

## 105. THE STATES AS AGENTS OF THE NATION

Ordinarily the Government of the United States carries out its functions through its own agents, but in some instances it utilizes the states as agents. To some extent the utilization of the states in this manner is based on the

Constitution of the United States and to some extent on practices which have grown up and were unforeseen by the framers of that instrument. They illustrate the intimate relation between the states and the nation.

[A. N. Holcombe, "The States as Agents of the Nation," *Southwestern Political Science Quarterly*, vol. I, pp. 310-326 (Mar., 1921).]

There are five separate cases in which the States may act as agents of the Nation.

The first is that in which the agency is expressly imposed upon them by the Constitution of the United States. Each State shall appoint its quota of presidential electors in such manner as its legislature shall direct; and the State legislatures shall prescribe the times, places and manner of holding elections for Senators and Representatives, subject to the power of the Congress to make or alter such regulations. The States also play an essential part in the process of constitutional amendment. It cannot be affirmed that the States have proved satisfactory agents in the performance of these electoral functions. The system of presidential election established by the framers of the Constitution broke down at the first real trial. The party organizations transferred the decisive influence from the legislature to the electorates, and after the rise of the national nominating convention in the Jacksonian era the legislature did not venture even to make nominations. The principal result of reliance upon the agency of the States in the choice of presidents is to saddle the country with the system of election by general ticket. This general ticket system gives the larger States an undue influence under ordinary circumstances and has produced serious evils which are too well known to require detailed consideration. If, however, through a division of the electoral votes between several candidates, an election should be thrown into the House of Representatives, the unit rule would operate in an exactly contrary manner and give the smaller States an influence greatly disproportionate to their population and importance. This might under readily conceivable circumstances bring disaster to the Nation.

The excessive inequality between the large and small States renders the States no less unsuited for the performance of their other political functions as agents of the Nation. The eight States of the arid and mountainous West, for example, though possessing only fourteen Congressmen, less than a thirtieth of the total, have a sixth of all the Senators. Such a disparity of population and political influence threatened to produce consequences

when the silver question was the dominant issue in national politics, and may in the future produce graver consequences. It would be possible for States possessing only one-twelfth of the Congressmen, through their disproportionate representation in the Senate, to prevent the submission of a constitutional amendment, and for States possessing only one-twentieth of the Congressmen to prevent its ratification. Such inequitable results are unlikely, but a system under which they are possible is a menace. Even if these results should never materialize, the inconvenience of leaving the management of presidential elections to the States is enough to condemn the system which utilizes the States as political agents of the Nation and would justify the exclusive regulation of national elections by the federal government, but for the difficulty in settling the suffrage problem.

The second case in which the States may act as agents of the Nation is that in which the Congress is expressly authorized to utilize the services of the States, if it wishes, though no duty is imposed upon them directly by the Constitution. The Congress, for instance, has power to call forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. The utilization of the militia, however, for national purposes has never proved satisfactory, and the federal government, when in need of forces to supplement the national army, has generally preferred to reorganize the militia as an integral part of the national military establishment or recruit additional forces without regard to the military establishments of the States. Prior to the enactment of the Selective Service law the recruitment of national forces was conducted by the federal government and little or no attempt was made to utilize the agency of the States. After the Spanish War an attempt was made to render the militia a more serviceable second line of defence through the grant of federal subsidies to the States to be expended under the supervision of the federal military authorities, but the results obtained down to the World War were not regarded as satisfactory. In general the federal government has been much more successful as the agent of the States for their protection against domestic violence than the States have been as agents of the Nation for the national defence. The tendency therefore is for the States to rely more and more upon the federal government for police protection and for the Nation to rely less and less upon the States as agencies of national defence.

The third case in which the States may act as agents of the Nation is that in which the Congress imposes duties of a charac-

ter not prohibited, though not explicitly authorized, by the federal Constitution. The first important instance in which the Congress ventured to utilize the services of the States in this manner without a clear constitutional mandate was its enactment of the fugitive slave law of 1793. . . .

The fourth case in which the States may act as agents of the Nation is that in which they voluntarily undertake duties neither required of them by the federal Constitution nor imposed upon them by the Congress. Assuming that what is not expressly prohibited to the States is within their power, even if not explicitly or implicitly reserved to them, they should be able to assist the federal government in the performance of many duties not now regarded as necessarily within the sphere of state action. Such a broad construction of the Constitution, if tenable, would open up a wide field for state action. They might, for example, regulate interstate and foreign commerce, in so far as their regulations did not conflict with those of the federal government, legislate on the subject of naturalization and bankruptcies, fix the standards of weights and measures, establish post-offices and post roads, and issue state patents and copyrights, conferring exclusive privileges upon inventors and authors within their several jurisdictions. In fact the States have exercised some of the powers within this field and have attempted to exercise others. The federal Supreme Court has sanctioned a part of this legislation and has condemned the rest. In some cases it has held that the absence of federal legislation with respect to a certain subject, over which exclusive jurisdiction has not been expressly conferred by the Constitution upon the Congress of the United States nor concurrent jurisdiction explicitly denied to the States, has the effect of leaving the field open to the States. In such cases state legislation has been sustained by the federal courts. Thus state insolvency laws were sustained in the absence of a national bankruptcy act. Much state legislation in regulation of interstate and foreign commerce has also been sustained under similar circumstances. In other cases the Supreme Court has held that the absence of federal legislation is to be construed as evidence of a purpose on the part of the Congress that there shall be no legislation on the part of the States with respect to the subjects concerned. In such cases the Court has consequently declared the state legislation invalid. These cases have been most conspicuous in connection with attempts on the part of the States to regulate commerce, and have become more numerous in recent



years. The general tendency has been in the direction of an expanding federal, and a contracting state, power.

The fifth case in which the States may act as agents of the Nation is that in which the federal government voluntarily assumes responsibilities not prohibited, though not expressly conferred upon it, by the Constitution, and previously borne by the States alone. In this case the States are already in possession of the field and there can be no question of their eviction by the federal government. But by the grant of federal subsidies in aid of established or projected state activities the States may become the agents of the Nation in so far as the expenditure of such grants is concerned. To what extent the federal government should attach conditions to the grants by means of which it may acquire an influence over the activities of the States not contemplated by the Constitution is a question of policy that does not require consideration here. It suffices to know that the implied powers of the federal government are broad enough to cover intervention in almost any field of administrative action in which it is sufficiently interested to be willing to supply substantial funds. . . .

Thus the Selective Service Act is not the only harbinger of a new era in the constitutional history of the States. Nearly sixty years ago Congress inaugurated the policy of federal grants to the States in aid of education. The Morrill Act of 1862 provided for the establishment of the state agricultural and mechanical colleges by an endowment of lands from the public domain. Subsequently, in 1890 and in 1907, Congress passed acts authorizing permanent appropriations of money towards the further development of the land-grant colleges. These funds are administered by the Bureau of Education of the Department of the Interior. In addition, the States Relations Service of the Department of Agriculture administers the funds provided by a series of acts, beginning in 1887, for the support of the agricultural experiment stations established in connection with the land-grant colleges, and of the coöperative extension work in agriculture and home economics. Finally the Federal Board for Vocational Education, created in 1917 on the eve of the War, administers the funds for the promotion by the States of vocational education in agriculture, industry, and commerce, and for the training of teachers of vocational subjects. By the acts of 1918 and 1920 this Board has also been charged with the allotment of additional sums for the vocational rehabilitation of disabled soldiers and sailors and of the victims of industrial accidents in

civil life. A similar policy has been adopted with respect to the improvement of rural post roads. Under the acts of 1912, 1916, and 1919, the Office of Public Roads in the Department of Agriculture administers the federal aid authorized for the improvement of such roads. This now amounts to one hundred millions of dollars a year and is expended by the State highway authorities under federal supervision. The Congress which has just adjourned had before it three measures of a similar character. One was to authorize an additional one hundred millions of dollars to be apportioned among the States under the Rural Post Roads acts; a second was to authorize the apportionment of an additional one hundred millions for educational purposes, the so-called Smith-Towner bill; and a third, the so-called Sheppard-Towner bill, to authorize the apportionment of a lesser amount to assist the States in providing for the public protection of maternity and infancy. The federal aid to be authorized by the first of these pending bills would be administered by the Department of Agriculture through its Office of Public Roads, as in the case of the earlier Rural Post Roads acts. The federal aid to be authorized by the Smith-Towner bill would be administered by a new Department of Education, which will absorb the existing Bureau of Education in the Department of the Interior. The aid contemplated by the Sheppard-Towner bill would be administered by another Federal Board representing the federal education authorities and the Public Health Service. The chief of the Children's Bureau in the Department of Labor is designated the executive officer of this Board.

Whatever may be the ultimate fate of these measures, this is the field in which the States have the most promising future. As electoral agencies the States have served the Nation badly. As the agency for recruiting the second line of national defence the States have served with no more than indifferent success. As instruments of national action in such matters as the rendition of fugitives they have put local interests and prejudices before the interests of the Nation as a whole. As agents in fields of administrative activity where their constitutional position is uncertain, their future is precarious and their utility doubtful. It is only in those fields of activity which they already occupy, and where the federal government intervenes in the character of financial associate and adviser that they have any real opportunity to serve as agents of the Nation. In this field, as changing economic and social conditions call for greater services on the

part of the government to the people, the signs portend an unprecedented development of administrative activity.

These considerations lead to the more general question: What is to be the future sphere of the States in the American political system? This is a question which has not ceased to engage the attention of thoughtful Americans from the time, one hundred and thirty-four years ago, when the federal Constitution was first submitted to the people of the United States. . . .

The decision to utilize the services of the States as agents of the Nation in the administration of the Selective Service Act did not in itself open up an opportunity for the States to rehabilitate their declining fortunes. But it reflected a consciousness of a growing opportunity in another field for the States to regain what they have lost as sovereign Commonwealths. Their function of national agents will become increasingly important as the Nation becomes more and more interested in activities originally carried on by the States alone. It is a common observation that the State governments are doing more for their people today than ever before. They raise more money, they employ more servants, they accomplish greater results. They may be relatively less powerful members of our political system, but they are more active, and action is the substance of government. This is partly the result of the increased demand for governmental action of many kinds which has resulted from the economic and social changes of recent years, a demand which the federal government alone has not been able to satisfy. Partly also it is the result of increasing public confidence in the administrative capacity of the States and recognition of their better adaptability to local needs. The evils of excessive centralization are better understood than a generation ago. While superior financial resources of the federal government make its assistance indispensable, the superior adaptability of the State governments to local conditions is likely more and more to lead the federal government to work through the agency of the States, securing the necessary degree of federal control by the power of the purse. Our dual system of government will respond to the changing conditions. It will tend to approximate a federal system of the German or Swiss type, in which the States will be able to justify their continued existence as administrative agents of the national government. This is the tendency which Madison and his associates foresaw, but it will come about in a manner which they did not anticipate. The federated states will not give way before a single consolidated and highly centralized State, as many statesmen and political

scientists have apprehended. They will continue to play a large, even an increasing, part in the administration of public affairs, but as instruments of national purposes rather than as independent political entities. The problem of administrative areas in the United States will not be solved by such a conversion of the sovereign States. Doubtless there will be fields of administrative action, such as perhaps railroad transportation and social insurance, in which new administrative areas for national purposes will be devised upon an economic or industrial rather than territorial foundation. The administration of public affairs will grow more rather than less complicated with the development of the functions of government. But the place of the State in the government of the Nation seems to be secure.

## 106. FEDERAL SUBSIDIES

A form of the extension of national control over the states which has recently grown to be of considerable importance is that through conditional grants of money by the National Government to be spent in the states for such purposes as education, good roads, and public health. In his budget message to Congress of December 8, 1925, President Coolidge called attention to this development and deprecated its further extension, both because of its drain on the National Treasury and also because it interfered with the performance by the states of properly state functions. Nevertheless, the tendency continues apace. The following selections give a typical act of Congress providing conditional grants of money to the states and a general discussion of the whole development by an authority in this field.

### a. The Sheppard-Towner Act

[*U. S. Statutes at Large*, vol. 42, pp. 224-226.]

An act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there is hereby authorized to be appropriated annually, out of any money in the Treasury not otherwise appropriated, the sums specified in section 2 of this Act, to be paid to the several States for the purpose of cooperating with them in promoting the welfare and hygiene of maternity and infancy as hereinafter provided.

SEC. 2. For the purpose of carrying out the provisions of this Act, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, for the current fiscal year \$480,000, to be equally apportioned among the several

States, and for each subsequent year, for the period of five years, \$240,000, to be equally apportioned among the several States in the manner hereinafter provided: *Provided*, That there is hereby authorized to be appropriated for the use of the States, subject to the provisions of this Act, for the fiscal year ending June 30, 1922, an additional sum of \$1,000,000, and annually thereafter, for the period of five years, an additional sum not to exceed \$1,000,000: *Provided further*, That the additional appropriations herein authorized shall be apportioned \$5,000 to each State and the balance among the States in the proportion which their population bears to the total population of the States of the United States, according to the last preceding United States census: *And provided further*, That no payment out of the additional appropriation herein authorized shall be made in any year to any State until an equal sum has been appropriated for that year by the legislature of such State for the maintenance of the services and facilities provided for in this Act.

SEC. 3. There is hereby created a Board of Maternity and Infant Hygiene, which shall consist of the Chief of the Children's Bureau, the Surgeon General of the United States Public Health Service, and the United States Commissioner of Education, and which is hereafter designated in this Act as the Board. The Board shall elect its own chairman and perform the duties provided for in this Act.

The Children's Bureau of the Department of Labor shall be charged with the administration of this Act, except as herein otherwise provided, and the Chief of the Children's Bureau shall be the executive officer. It shall be the duty of the Children's Bureau to make or cause to be made such studies, investigations, and reports as will promote the efficient administration of this Act.

SEC. 4. In order to secure the benefits of the appropriations authorized in section 2 of this Act, any State shall, through the legislative authority thereof, accept the provisions of this Act and designate or authorize the creation of a State agency with which the Children's Bureau shall have all necessary powers to co-operate as herein provided in the administration of the provisions of this Act: *Provided*, That in any State having a child-welfare or child-hygiene division in its State agency of health, the said State agency of health shall administer the provisions of this Act through such divisions. If the legislature of any State has not made provision for accepting the provisions of this Act the governor of such State may in so far as he is authorized to do so by

the laws of such State accept the provisions of this Act and designate or create a State agency to co-operate with the Children's Bureau until six months after the adjournment of the first regular session of the legislature in such State following the passage of this Act. . . .

SEC. 8. Any State desiring to receive the benefits of this Act shall, by its agency described in section 4, submit to the Children's Bureau detailed plans for carrying out the provisions of this Act within such State, which plans shall be subject to the approval of the board: *Provided*, That the plans of the States under this Act shall provide that no official, or agent, or representative in carrying out the provisions of this Act shall enter any home or take charge of any child over the objection of the parents, or either of them, or the person standing in loco parentis or having custody of such child. If these plans shall be in conformity with the provisions of this Act and reasonably appropriate and adequate to carry out its purposes they shall be approved by the board and due notice of such approval shall be sent to the State agency by the chief of the Children's Bureau. . . .

SEC. 10. Within sixty days after any appropriation authorized by this Act has been made, and as often thereafter while such appropriation remains unexpended as changed conditions may warrant, the Children's Bureau shall ascertain the amounts that have been appropriated by the legislatures of the several States accepting the provisions of this Act and shall certify to the Secretary of the Treasury the amount to which each State is entitled under the provisions of this Act. Such certificate shall state (1) that the State has, through its legislative authority, accepted the provisions of this Act and designated or authorized the creation of an agency to co-operate with the Children's Bureau, or that the State has otherwise accepted this Act, as provided in section 4 hereof; (2) the fact that the proper agency of the State has submitted to the Children's Bureau detailed plans for carrying out the provisions of this Act, and that such plans have been approved by the board; (3) the amount, if any, that has been appropriated by the legislature of the State for the maintenance of the services and facilities of this Act, as provided in section 2 hereof; and (4) the amount to which the State is entitled under the provisions of this Act. Such certificate, when in conformity with the provisions hereof, shall, until revoked as provided in section 12 hereof, be sufficient authority to the Secretary of the Treasury to make payment to the State in accordance therewith.

SEC. 11. Each State agency co-operating with the Children's Bureau under this Act shall make such reports concerning its operations and expenditures as shall be prescribed or requested by the bureau. The Children's Bureau may, with the approval of the board, and shall, upon request of a majority of the board, withhold any further certificate provided for in section 10 hereof whenever it shall be determined as to any State that the agency thereof has not properly expended the money paid to it or the moneys herein required to be appropriated by such State for the purposes and in accordance with the provisions of this Act. Such certificate may be withheld until such time or upon such conditions as the Children's Bureau, with the approval of the board, may determine; when so withheld the State agency may appeal to the President of the United States who may either affirm or reverse the action of the Bureau with such directions as he shall consider proper: *Provided*, That before any such certificate shall be withheld from any State, the chairman of the board shall give notice in writing to the authority designated to represent the State, stating specifically wherein said State has failed to comply with the provisions of this Act.

SEC. 12. No portion of any moneys apportioned under this Act for the benefit of the States shall be applied, directly or indirectly, to the purchase, erection, preservation, or repair of any building or buildings or equipment, or for the purchase or rental of any buildings or lands, nor shall any such money or moneys required to be appropriated by any State for the purposes and in accordance with the provisions of this Act be used for the payment of any maternity or infancy pension, stipend, or gratuity.

SEC. 14. This Act shall be construed as intending to secure to the various States control of the administration of this Act within their respective States, subject only to the provisions and purposes of this Act.

Approved, November 23, 1921.

### b. The American Subsidy System

[A. F. Macdonald, in *National Municipal Review*, vol. XIV, pp. 692-701 (Nov., 1925).]

One of the most extraordinary political phenomena of the last decade has been the growth of a series of federal subsidies to the state governments. Not that there is anything unusual in the granting of land and money to the states for various purposes;

such a policy is almost as old as the federal government. In 1802 Ohio received certain sections of land for the use of schools, and payment was early made to the states of a portion of the proceeds from the sale of public lands lying within their borders. But the development of the last ten years has been remarkable in part because of the vast increase in appropriations, and in part because of the extension of federal supervision and control over state activities.

In 1914 congressional appropriations for distribution to the states totaled slightly more than six million dollars; the amount appropriated for the fiscal year ending June 30, 1926, was in excess of one hundred and thirty-two millions. The following table shows the purposes for which subsidies were granted:

TOTAL SUBSIDIES TO THE STATES FOR THE FISCAL YEAR ENDING  
JUNE 30, 1926

Education:

Support of agricultural colleges.....	\$ 2,400,000
Support of experiment stations.....	1,440,000
Co-operative agricultural extension work.....	5,880,000
Farmers' co-operative demonstrations.....	1,000,000
Vocational education.....	7,167,000
Industrial rehabilitation.....	1,034,000
Total education.....	<u>\$18,921,000</u>
Highways .....	75,000,000
National Guard.....	31,466,486
Forest fire prevention.....	660,000
Distribution of forest planting stock.....	50,000
Maternity and infant hygiene.....	1,000,000
State fund under oil leasing act.....	*5,034,178
State fund from sale of public lands.....	<u>*14,527</u>
Grand total .....	<u>\$132,146,191</u>

\* 1924.

The above table does not tell the entire story, however. Many thousands of acres of the public domain will be transferred to the states during the fiscal year 1926. Since the close of the World War millions of dollars' worth of surplus war material has been delivered to the states for purposes of highway construction. Nearly every year the states receive in addition other grants of money which, because of their sporadic nature and the manner in which they are granted, cannot be estimated with any degree



of accuracy. One hundred and thirty-two million dollars is therefore a conservative estimate of the amount annually placed by Congress at the disposal of the states.

For a small portion of this expenditure the federal government receives practically nothing in return. A few of the earlier acts making annual grants of money and land were passed at a time when the spirit of localism was still strong, and the measure of control given the federal government over these subsidies was small indeed. But for more than nine-tenths of the funds annually granted to the states Congress requires a definite accounting and a large measure of federal supervision and control.

An excellent example of the manner in which federal control over state affairs may be secured without violating the Constitution is found in the case of venereal disease legislation. To prevent the spread of these diseases the national government offered grants of money annually to the states, under certain conditions. One of these conditions was that each state receiving the subsidy should enact legislation concerning the travel of venereally infected persons within its borders similar to federal legislation already in force with regard to persons taking interstate journeys. The national government made itself the judge as to whether or not state laws did actually conform to its own regulations, and reserved the right to withhold future allotments if in its judgment they did not so conform.

In this manner the federal government was able practically to exercise control over intrastate commerce, a matter reserved to the states under the Constitution. Of course, the letter of that document was not violated. The states were not compelled to pass legislation satisfactory to the national authorities unless they wished to receive the federal subsidy. But the inducement proved sufficient to cause forty-six states to meet requirements, thus approaching unanimity.

Venereal disease control, essentially a war time measure, was abandoned by the federal government with the return of peace. But there are many other fields in which national uniformity and coherence are rising from the ruins of state diversity and chaos. In the last decade subject after subject formerly left entirely in the hands of the states has been brought under federal supervision by means of the subsidy system. The states have been induced to permit national inspection and regulation of their forests, their militia, their highways. Their need for constantly increasing revenues has forced the states to ask for federal financial assistance with growing frequency, and so they

have been obliged to acquiesce in "informal amendments" to the Constitution, by means of which national standards are being established and national minimums enforced.

The present federal subsidy system had its inception in a bill introduced in the House of Representatives by Justin S. Morrill in 1857. This measure granted twenty thousand acres to each state for each senator and representative, the money for the sale of the land to be invested, and the interest used as a perpetual fund for "the endowment, support and maintenance of at least one college where the leading object" was to be, "without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts."

Despite the bitter opposition of the southern members of Congress, who feared any further extension of federal authority, the bill passed both houses; but it was vetoed by President Buchanan. Again introduced in 1861, it once more faced the virulent attacks of southern critics, and it did not become law until 1862, after the withdrawal from Congress of every member from the seceding states. In its final form the Morrill Act contained little to alarm the foes of administrative centralization. It made almost no provision for the exercise of federal supervision or control over the expenditure by the states of the funds derived from the federal subsidy. All that was required was that reports should be made annually of the progress of each college, the sales of land scrip, and the use made of the proceeds therefrom.

Congress did not fix a minimum price for which the lands might be sold, with the result that most of them were disposed of at ridiculously low figures. The competition of the unsold national lands tended to force the price of the college lands down to the government price of a dollar and a quarter an acre. Some of the states that had no national lands with their borders even sold the scrip given them in lieu of land for fifty or sixty cents an acre, Pennsylvania securing but fifty cents an acre for most of its scrip, and Ohio even less.

How far short these states fell of realizing the magnificent possibilities of their endowment is made clear by comparing their action with that of the State of New York, which assigned all its scrip to Ezra Cornell at sixty cents an acre, with the understanding that he should pay for the land as he sold it, and that all receipts above sixty cents an acre should become an endowment for a university. Mr. Cornell located the scrip in the

white-pine district of Wisconsin, and eventually sold most of the land at an average price of six dollars and seventy-three cents an acre. This gave Cornell University an endowment in excess of five and one-half million dollars.

The next subsidy law passed by Congress was the Hatch Act of 1887, which made an appropriation of \$15,000 to each state and territory for the establishment and maintenance of an experiment station in connection with each of the agricultural colleges established under the Morrill Act of 1862. This statute made no real advance over the first Morrill Act in the matter of federal control. The only section providing for co-operative relations between the general government and the stations declared that "in order to secure, as far as practicable, uniformity of methods and results in the work of said stations, it shall be the duty of the United States Commissioner of Agriculture to furnish forms, as far as practicable, for the tabulation of results of investigation or experiment; to indicate from time to time such lines of inquiry as to him shall seem most important, and, in general, to furnish such advice and assistance as will best promote the purpose of this act." No means was provided for compelling the stations to accept and profit by this advice and assistance. There was practically no supervision over state expenditures.

But in 1911 a long step forward was taken with the passage of the Weeks Act, which made an appropriation of \$200,000 "to enable the Secretary of Agriculture to co-operate with any state or group of states, when requested to do so, in protection from fire of the forested watersheds of navigable streams." The Secretary of Agriculture was given wide discretionary powers, only three limitations being placed upon the use of federal funds. One was that they should be devoted entirely to the protection of private or state forest lands situated upon the watersheds of navigable rivers; another was that they should not be allotted to any state unless it had itself provided for a system of forest fire protection; and the third, that the federal expenditure in any state should not exceed in any fiscal year the state appropriation for the same purpose. Here in embryonic form we find for the first time the characteristic features of the American subsidy system—state autonomy combined with federal supervision, and state matching of federal funds. The outstanding weakness of the act of 1911 was that it limited federal co-operation to the forested watersheds of navigable streams. These areas are but one portion of the great wooded regions requiring protection

from fire. In 1924 this defect was corrected by the passage of the Clarke-McNary Law, which extended federal aid to all the timbered and cutover lands of the forest areas of the United States. A small annual appropriation was also made to enable the federal government to co-operate with the states in the reforestation of denuded lands.

Highly significant in the development of federal aid was the passage in 1914 of the Smith-Lever Act, providing for co-operative agricultural extension work between the United States Department of Agriculture and the land grant colleges in the several states, to "consist of the giving of instruction and practical demonstrations in agriculture and home economics to persons not attending or resident in said college in the several communities, and imparting to such persons information on said subjects through field demonstrations, publications, and otherwise."

This statute contained two highly significant provisions. One was the basis of apportionment of the federal subsidy. Most of the earlier laws had allotted an equal amount to every state, regardless of its needs. The new act, after granting ten thousand dollars to each state, provided that the remainder should be distributed in the proportion which the rural population of each state bore to the rural population of all the states, as determined by the last preceding federal census. This more rational method of apportionment has done much to insure the popularity of the subsidy system. If millions of dollars are to be distributed annually to the states from the federal treasury, great commonwealths like New York and Ohio cannot be expected to agree to an arrangement that will give them no more than states such as Rhode Island and Delaware. The proportionately greater needs of the larger states must be recognized. On the other hand, the ten thousand dollar subsidy to each state, regardless of its population or size, makes certain that no commonwealth will lack adequate funds to carry out a profitable program of agricultural extension work.

The other significant section of the act stipulated that "no payment out of the additional appropriations herein provided shall be made in any year to any state unless an equal sum has been appropriated for that year by the legislature of such state, . . . for the maintenance of the co-operative agricultural extension work provided for in this act." This plan of requiring the states to "match the federal dollar" has been incorporated in all subsequent legislation granting federal aid, and has proved of great value. Not only has it stimulated local initiative and

created a feeling of local responsibility, but it has vastly increased the funds available for co-operation between the federal government and the states. . . .

In 1916 the construction of highways was brought under the federal subsidy system. The statute passed in that year provided in sweeping terms for federal supervision and control of the public roads of the United States. It made large appropriations, to be expended by the Secretary of Agriculture, in co-operation with the highway departments of the several states, in the construction of rural post roads. Reconstruction and improvement of the highways, including the erection of necessary bridges and culverts, were to be a part of the work done by the federal government; but maintenance, including the making of needed repairs and the preservation of reasonably smooth surfaces, was made an obligation which the states must fulfill in order to receive federal allotments. The statute provided that "if at any time the Secretary of Agriculture shall find that any road in any state constructed under the provisions of this act is not being properly maintained he shall give notice of such fact to the highway department of such state and if within four months from the receipt of said notice said road has not been put in a proper condition of maintenance then the Secretary of Agriculture shall thereafter refuse to approve any project for road construction in said state . . . whose duty it is to maintain said road, until it has been put in a condition of proper maintenance." This clause put into the hands of the federal government a most effective weapon for enforcing federal maintenance requirements. . . .

Enough has been said to make clear the manner in which the federal government enforces its requirements, and the other subsidies may therefore be treated in considerably less detail. As early as 1808 Congress began to make appropriations for arming and equipping the militia of the states, but it did not attempt to enforce national standards of any sort until 1886, when it attached to the appropriation for that year the proviso that "no state shall be entitled to the benefits of the appropriation apportioned to it unless the number of its regularly enlisted, organized and uniformed active militia shall be at least one hundred men for each senator and representative to which such state is entitled in the Congress of the United States." No administrative machinery was provided for enforcing this requirement, however, and the states were virtually free to obey or disregard it as they saw fit.

Acts passed in 1903 and 1908 extended congressional control, and in 1916 the National Defense Act provided in sweeping terms for federal supervision and control of the militia. Several times amended, it has made possible the creation of a nationally organized body of state troops auxiliary to the regular army, and similarly equipped and disciplined. The word "militia" was dropped altogether, the term "National Guard" appearing in its place. The change in phraseology is significant. In its final form the statute fixes the number of men ultimately to be enlisted at eight hundred for each senator and representative in Congress, and authorizes the President to prescribe the unit or units, as to the branch of service, to be maintained in each state. The qualifications for officers of the National Guard are enumerated in detail. They are to be drawn only from certain specified classes, and are to be examined as to their physical, moral and professional fitness by a board appointed by the Secretary of War.

Each company, troop, battery and detachment in the National Guard is required to assemble for drill and inspection at least forty-eight times annually, and to participate in encampments at least fifteen days, credit being given only for training of a prescribed character and duration participated in by a minimum number of officers and men. The period of original enlistment, after several changes, has finally been fixed at three years. Even the kinds of courtmartial to be used in the National Guard are specified by the National Defense Act, which sets forth minutely their jurisdiction and powers.

A number of other subjects, none of them placed within the scope of congressional action, either expressly or impliedly, by the Constitution, have been brought under federal supervision by means of the subsidy system. The most important of these are vocational education, the physical and economic rehabilitation of those injured in industry, and the promotion of the welfare and hygiene of maternity and infancy. Subsidies are also given for the eradication of the foot-and-mouth disease and for arresting the ravages of the pink boll-worm and other pests. In every case a large amount of federal control is required.

The rapid growth of the American subsidy system in the last decade has forced it upon the attention of men in public life, and has subjected it to the attacks of a host of critics. The objections raised are much the same as those advanced against any form of centralization. One group of opponents still advances the old arguments of the ante-bellum states' rights school. Sub-

sidies, we are told, are leading to the development of a despotic central government which will absorb the powers of the states and menace the private liberties of their citizens. The federal government is pictured as a giant octopus, reaching out with greedy arms to rob the people of their rights. The specter of an omnipotent and merciless bureaucracy is conjured up to affright the timid. The people are warned "to halt the destructive processes that are transferring all of the powers of local self-government to remote and irresponsible bureaus in Washington." The fallacy of this line of reasoning is obvious. Few people will accept a creed which implies that the state legislatures represent the people, while the national Congress does not; that the states are the jealous guardians of the civil liberties which a rapacious federal government is constantly striving to destroy.

Somewhat different, however, and much more difficult to refute, are the arguments of those who maintain that the rapid expansion of federal power will overburden the general government, and will inevitably lead to a breakdown of federal administration. They willingly admit that the work of government should be performed by that unit of government best fitted to perform it, and they acknowledge the superior efficiency of federal administration as compared with that of the states. But they add that this superiority is attributable to the smaller amount of work performed by the national government, and will speedily disappear when many of the duties now performed by the states are transferred to Washington. In this they may be correct. There may be a point beyond which federal administration will cease to function satisfactorily. But we have not yet reached that point. There can be no doubt that the supervision and control which the federal government has exercised over state activities during the last decade by means of its subsidy system has brought about distinctly higher standards in the state boards and departments affected.

When federal grants had reached sufficient size to attract general attention, their constitutionality was questioned on the ground that they were an illegal attempt by Congress to legislate within the field of powers reserved exclusively to the states. In the spring of 1922 the Attorney General of Massachusetts gave an opinion that the Sheppard-Towner Act for the promotion of the welfare and hygiene of maternity and infancy was unconstitutional, and shortly afterward Massachusetts brought suit to prevent its enforcement. The Sheppard-Towner Act was well

chosen for the test, because it dealt with matters clearly beyond the scope of direct action by Congress. Had some other law, such as the Federal Highway Act, been chosen, it might well have been replied that the Constitution itself vested in Congress the power to establish post offices and post roads. But no such retort was possible in considering the care of maternity and infancy.

The opinion of the Supreme Court was delivered on June 4, 1923, in the joint cases of *Mass. v. Mellon* and *Frothingham v. Mellon*. The court dismissed the cases without considering the constitutional questions involved, on the ground that the mere question of congressional usurpation of state powers, when no personal or property rights were directly affected, was political rather than judicial in its nature, and therefore not subject to court action. The Supreme Court made several interesting statements, however, in the course of its decision, which, while in the nature of *obiter dicta*, yet make clear the attitude of the highest court of the land towards the subsidy system. "It is alleged," said the court, "that the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the states. Nothing is added to the force or effect of this assertion by the further incidental allegations that the ulterior purpose of Congress thereby was to induce the states to yield a portion of their sovereign rights; that the burden of the appropriations falls unequally upon the several states; and that there is imposed upon the states an illegal and unconstitutional option either to yield to the federal government a portion of their reserved rights or lose their share of the moneys appropriated. But what burden is imposed upon the states, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the states where they reside. Nor does the statute require the states to do or yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding." These words seem to remove all doubt as to the constitutionality of federal subsidies to the state governments.

The question of expediency remains, and will probably remain a subject of dispute as long as subsidies are granted. Whether good or bad, however, there can be no doubt that subsidies have proven extremely popular. The state legislatures have had to



face a demand for a constantly higher standard of governmental service—for better schools, for better roads, for better protection. At the same time they have been met with an equally insistent demand for no further increase in the burden of taxation. The problem of getting more money without raising tax rates has become acute. State legislatures have searched diligently for new sources of revenue, and one of the most prolific sources they have discovered has been the federal treasury. The general government has been willing to aid the states financially on its own terms, and the slight circumstance of accompanying federal supervision and control has not restrained the states from seeking federal grants. Nearly every state has accepted all or nearly all the subsidies proffered by the general government. Even Massachusetts, while protesting the constitutionality of the system before the Supreme Court of the United States, was receiving millions of dollars in the form of various subsidies.

The growth of federal grants since 1912 is as follows:

<i>Year</i>	<i>Amount</i>
1912 .....	6,060,483.60
1913 .....	6,642,300.18
1914 .....	6,205,679.21
1915 .....	12,121,227.91
1916 .....	9,625,568.79
1917 .....	53,418,073.41
1918 .....	48,068,415.73
1919 .....	87,816,144.50
1920 .....	122,230,144.51
1921 .....	137,478,785.51
1922 .....	180,463,450.03
1923 .....	108,161,408.69
1924 .....	126,268,056.30
1925 .....	128,300,238.44
1926 .....	132,146,191.55

The decrease since 1922 is the result of smaller appropriations for highway construction. Large sums are still spent on the work, however; and highway grants at present represent considerably more than fifty per cent of all subsidies. The National Guard and education are also important items, as will be seen by referring to the table at the beginning of this article showing the amounts of the several appropriations for the fiscal year ending June 30, 1926.

A word should be said in conclusion as to the necessity for

a definite subsidy program. Grants are made by Congress without any coherent program before it. Some are made for objects of doubtful worth; nearly all are made without regard to the amount necessary to stimulate local authorities to the highest degree of efficiency. Subsidies are granted for the most part on the basis of population; and population is at best a poor yardstick with which to measure local needs. The percentage of the total cost of performing each function of government which is borne by the nation as a whole varies from seventy per cent. of the total expense of maintaining the National Guard to one and one-half per cent. of all public expenditures for education. Some grants are made to the states unconditionally; others are made only in exchange for a large measure of federal supervision and control. If subsidies have become an established and essential part of American federal administration—and such seems to be the case—then Congress should determine without delay what principles are to guide the future distribution of federal funds to the states.

### 107. THE COLORADO RIVER COMPACT

Under the supervision of Secretary of Commerce Hoover, a compact, sometimes known as the "Seven-State Irrigation Treaty", was negotiated and signed at Santa Fe, New Mexico, on November 24, 1922, by representatives of the seven states having water rights in the Colorado River, and undertook to allocate such rights. Up to the present time (1928), Arizona has refused to ratify the agreement, while California ratified conditionally. The situation illustrates some of the methods and difficulties of state cooperation in accomplishing common purposes.

[*Current History*, vol. 17, pp. 1000–1002 (Mar., 1923).]

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, having resolved to enter into a compact under the act of the Congress of the United States of America approved Aug. 19, 1921 (42 Statutes at large, page 171), and the acts of the Legislatures of the said States, have through their Governors appointed as their Commissioners: W. S. Norviel for the State of Arizona, W. F. McClure for the State of California, Delph E. Carpenter for the State of Colorado, J. G. Scrugham for the State of Nevada, Stephen B. Davis, Jr. for the State of New Mexico, R. E. Caldwell for the State of Utah, Frank C. Emerson for the State of Wyoming, who, after negotiations participated in by Herbert Hoover, appointed by the President as the representative of the United States of America, have agreed upon the following articles:

ARTICLE 1—The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River system; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River basin, the storage of its waters and the protection of life and property from floods. To these ends the Colorado River basin is divided into two basins, and an apportionment of the use of part of the water of the Colorado River system is made to each of them, with the provision that further equitable apportionments may be made.

[ARTICLE 2 defines various terms used in the compact.]

ARTICLE 3—(a) There is hereby apportioned from the Colorado River system in perpetuity to the upper basin and to the lower basin respectively the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre feet per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River system, such water shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the upper division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in containing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the upper division shall not withhold water, and the States of the lower division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of

the waters of the Colorado River system unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in paragraph (g) at any time after Oct. 1, 1963, if and when either basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to the President of the United States of America, and it shall be the duty of the Governors of the signatory States and of the President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the upper basin and lower basin the beneficial use of the unapportioned water of the Colorado River system as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

ARTICLE 4—(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River system may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use and distribution of water.

ARTICLE 5—The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey, shall co-operate, ex officio:

(a) To promote the systematic determination and co-ordination of the facts as to flow, appropriation, consumption and use of water in the Colorado River basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

ARTICLE 6—Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River system not covered by the terms of this compact: (b) over the meaning or performance of any of the terms of this compact: (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided: (d) as to the construction or operation of works within the Colorado River basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

ARTICLE 7—Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

ARTICLE 8—Present perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the lower basin, then claims of such rights, if any, by appropriators or users of water in the lower basin against appropriators or users of water in the upper basin shall attach to and be satisfied from water that may be stored not in conflict with Article 3.

All other rights to beneficial use of waters of the Colorado River system shall be satisfied solely from the water apportioned to that basin in which they are situate.

ARTICLE 9—Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

ARTICLE 10—This compact may be terminated at any time by

the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

ARTICLE 11—This compact shall become binding and obligatory when it shall have been approved by the Legislature of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

DONE at the City of Santa Fe, New Mexico, this twenty-fourth day of November, A. D. One Thousand Nine Hundred and Twenty-two.

W. S. NORVIEL,  
W. F. McCLURE,  
DELPH E. CARPENTER,  
J. G. SCRUGHAM,  
STEPHEN B. DAVIS JR.,  
R. E. CALDWELL,  
FRANK C. EMERSON.

Approved:

HERBERT HOOVER

## 108. WORK OF GOVERNORS' CONFERENCES

An organization of state governors was effected in 1908 upon the call of President Roosevelt for the purpose of considering the conservation of natural resources. The governors have since then maintained a continuous organization and hold annual meetings for the discussion of problems of common interest. At the second and third meetings, held in 1910, addresses in which the work of the governors' conference was discussed were made by two of our leading statesmen, Woodrow Wilson and Charles E. Hughes. They represent the idealistic and the practical views, respectively, of the work and far-reaching possibilities of the conference.

### a. The Possibilities of the Governors' Conference

[Woodrow Wilson, in *Proceedings of the Third Meeting of the Governors, November, 1910*, pp. 42-54.]

We are met together to take counsel. No doubt there is much else that we gain by coming together besides a knowledge of each other's views with regard to large public questions. We take stimulation from one another. We are drawn together by friendliness and sympathy and the common interests of similar tasks. We learn to know one another, not only, but also to know better the great country which we serve—to know it in its variety and with a touch of intimacy and reality which would not otherwise be easily possible. But our main object is counsel, sober and deliberate conference upon great questions and problems of State upon which we would, if possible, be guided by full knowledge and by clear principles of action. . . .

Our constitutional life is constantly changing; I mean the uses to which we put the powers of our Legislatures, of our executives, and of our courts. Not only is the series of constitutional decisions of any one of our supreme courts a history of change and constant, though related, variation, but there is a whole sphere of experiment, of influence, of varied action which the courts never touch, where forces play which never settle to any such form as can afford the courts subject matter for decision—the rules of legislative bodies, the personal relations of executives and Legislatures, the action and organization of parties, the interplay of all those intangible forces of agitation and quiet opinion which affect legislation and the public thought in communities great and small, States, cities, homogeneous regions that span whole groups of States, climatic or social or economic units which have a consciousness and a movement of their own and whose life springs into forms native, natural, distinctive.

The thing we are here trying to do is to co-ordinate and form some of these otherwise vagrant forces. It is an extra-constitutional enterprise, but natural, spontaneous, imperative, perhaps creative. If it is not constitutional in kind, according to the strict uses of that word in America, it is at least institutional. If these conferences become fixed annual events, planned for and carried forward from year to year as an habitual means of working towards common ends of counsel and co-operation, this council will at least become an institution. I do not know how better to define an institution than by saying that it is an habitual and

systematic way of doing something which calls for co-operation and a certain union in action.

If it grows into a dignified and permanent institution, it will be because we have found it necessary to supply some vital means of co-operation in matters which lie outside the sphere of the Federal Government, matters which the States must regulate but which they find it to their interest, and to the interest of the country as a whole, to regulate according to common principles and a very careful adaptation to conditions which no one State can control—matters in regard to which they ought to act, not necessarily alike, but with a careful regard to imperative consideration of general policy which can be differently applied but cannot safely or wisely be differently conceived. In brief, we are setting up, outside the sphere of the Federal Congress, a new instrument of political life, national in its character, scope, and intention; an instrument, not of legislation, but of opinion, exercising the authority of influence, not of law.

I am sure that I am not mistaken when I say that the people are calling for open leadership, and that they wish their leaders to be men who represent them all. They are tired of the hide-and-seek of legislation as it has generally been conducted. We shall not bring clear action out of confusion until we supply the need, until we assist at the simplification which will inevitably come when some one man undertakes in each State to keep the people informed as to every chief step of their business, particularly of the business of legislation, and to challenge all who are engaged in it to submit to the frank and clarifying processes of debate. There is no executive usurpation in a governor's undertaking to do that. He usurps nothing which does not belong to him of right, uses no power which would not belong to him whether he were governor or not. He employs nothing but his own personal force and the prevailing power of his opinions. He who cries usurpation against him is afraid of debate, wishes to keep legislation safe against scrutiny, behind closed doors and within the covert of partisan consultations. We are consulting here because the leadership of half a hundred commonwealths calls for consultation among the leaders wherever many weighty matters must in the common interest be managed to a common end.

This, as well as our individual leadership in our several commonwealths, is, by intention at least, a simplifying process. Consultation always is a simplifying process, when it is frank and is intended for the common interest. We wish to simplify our tasks



of leadership by making ourselves acquainted with all the elements of the complex problems we are called upon to deal with. That we can do by informing ourselves and by informing one another. We shall by our leadership under such influences bind our States together more truly than ever before into a nation, whose standard and aims are the same, however different may be their forms of action, however various their several measures may be in their adaptation to time and place and circumstance. Cooperation amidst variety is what we seek. If we find it we shall in a new age of energy illustrate once more the American genius for affairs, for the making and use of institutions.

I have already stated our problem in general terms. It is how to make our States efficient instruments wisely used in the regulation of economic conditions which have been organized upon a scale, and must continue to exhibit themselves upon a scale, that is nation wide, no State being more than a part, and generally a small part, of the territory which they cover. It is the problem of railway regulation and of the regulation of the many other vast corporations whose business spreads like a network over every part of the country. We speak of public service corporations and of those which are not public service corporations, and there is of course a difference, a clearly marked difference, between them; but when we speak of modern business is it speaking of reality in any case to speak of a modern corporation as a private corporation, of its business as private business? It acts only upon license. Its transactions are interlaced with the whole of modern life and set up the conditions under which that life goes forward. This is in no sense a private matter. Our corporations are not dealing with individuals so much as with communities. If those who conduct them would look at their business from that point of view and conduct themselves in the temper and spirit of public servants there would be no need of regulation. So long as they do not, so long as they transact their business in the spirit of those who manage private affairs, for private gain and not for public service, regulation will be necessary. Individual affairs and public interests must be accommodated, and the public interests, not the private advantage, must be the standard of regulation and accommodation.

Here then, in more particular terms, are the large items of our tasks, as we must view them in council together. There is, first, the task of regulation; for that we seek common principles, common ideas and aims, at the same time that we recognize that these common principles must be put into effect in our several

States in somewhat different ways, in order to serve local needs and conditions. We seek co-operation but can wear no strait-jacket. The task of right regulation, for example, in the case of common carriers, in particular, whose business spans a score of States, is a task in which we must co-operate, with one another and with the federal authorities, though it may be that local regulation may without injustice or serious breach of common practice be based upon different calculations and different elements of business in different commonwealths. Variety will not impair energy if there be genuine co-operation and a real common understanding such as we ought to be able to bring about. For our problem, looked at from another angle, is one of coordination. I am not now referring to the important matter we are so much concerned with in regard to uniformity of laws; the laws of marriage and divorce, for example, the laws of commercial transaction, and those many other matters which so vitally affect the morals or the inconvenience of our scattered communities. I am thinking of the matter of forests and water sheds and mines, of the great tasks of sanitation, of the treatment of epidemics, the care of the poor and the restraint of the vagrant, of the safeguarding of labor, and all that long list of vital interests with regard to which we can do so much more if we act together and upon the same common plan.

Conservation is a very much bigger subject than would appear from many of our discussions of it, and it is a much more difficult and intricate subject for the States than for the Federal government. The greater part of the resources of the country are outside the bounds of the federal domain and there is much more to conserve than what we generally include under the term natural resources. The vitality of the country lies chiefly in its people, in their moral wholesomeness and their physical strength and soundness. The purification of our life and of our politics is a central matter of conservation, fundamental to all the rest. We cannot make men moral or make them well by statute, but we can lend the aid of the community in many powerful ways in the safeguarding of health and the purification of life; and our moral and physical contagions are interstate. We give and take in these matters throughout the Union.

But of course the more tangible things are our physical resources, their protection and renewal; and these can seldom be effectually accomplished without the co-operation of State with State. We must safeguard and renew our forests; we must renew our soils and improve our methods of agriculture; we must

preserve our great streams—not only preserve them in their undiminished volume in order that they may continue to be the highways of intercourse, but also preserve them from contamination in order that they may be wholesome and serviceable for all uses; and so treat them that they may furnish cheap power to drive our industries; we must guard against exhaustion by selfish private use of our great mineral resources—particularly those which, like coal, furnish the necessities of life to whole communities. We must develop as well as preserve. We must dig canals where they will be serviceable and see to it that they are not monopolized by private interests. In all things we must quicken as well as conserve.

We must equalize, too; I mean that we must seek common means by which to open opportunities of all kinds as freely as possible to the choice of individuals, so that our lives may not be too much tied up in organization, may be as open as possible to honest competition and individual initiative. Many of our laws of business need reconsideration from top to bottom. They are made in one economic age and are being used, clumsily enough, in another. Their adaptation may well be a matter of common counsel along with the other matters of general adjustment of which I have spoken.

But the list is not of consequence. I have sought to use every question I have alluded to only as an illustration. It is the theme that holds my attention and enlists my enthusiasm; the institutional life of the country, the gathering together of the infinitely varied threads of our national experience, the mediation of vital processes, the hope here held out in these quiet conferences that the economic life of the nation may be eased and facilitated, its political life purified and quickened by our counsels and purpose. This has ever been the way in which America has proved her fertility of political capacity. Voluntary conferences of men who have nothing to offer but service and sober counsel have at every stage of our development furnished the subject matter of our reforms. We are doing what each generation of public men before us have done; we are seeking to find out by counsel a way of life.

#### b. Scope and Purpose of the Governors' Conferences

[Charles E. Hughes, in *Proceedings of the Second Meeting of the Governors, January, 1910*, pp. 14-21.]

We are not here to direct the influence of the high office to which we have been chosen in the several States toward matters

outside our official cognizance. It would be unfortunate in my judgment if there should be confusion in the public mind with regard to the proper agencies of national action, or if we should endeavor to develop in a meeting of the Governors of the States an extra-constitutional body to deal with questions which are not the concern of the States as such. Our influence, I believe, will be enhanced, and the gains to be derived from our mutual intercourse will be far greater, if we confine ourselves to those matters which lie within our respective spheres as State Executives.

But where State action is involved, it is the prerogative of the State Governor either to act, if the subject lies within his administrative authority, or to make recommendations to the Legislature if the action be legislative. And it is those matters which may properly be the subject of official consideration on the part of a State Executive that I conceive to fall within the province of this Conference of State Governors.

Nor is it likely that we shall forget that within this sphere the advantage of these meetings must be found in the formation of common sentiment. We cannot commit the States to any course of action. It is not sought, and even if we could overlook the difficulties in the way it should not in my judgment be sought, to create another agency of government or to invest a body such as this with governmental functions. We have our agencies of government, State and Federal, and their respective functions should be clearly defined in the public mind and should invariably be recognized. These agencies are adequate, and the object of our meeting is simply to promote their usefulness, so far as they pertain to the States.

But if it can be deemed to be of advantage that we should secure greater uniformity of State action and better State Government—and who shall deny this—it would be difficult if not impossible to suggest any better means for generating the necessary motive power than may be supplied through conferences of Governors.

We are but few in number and represent the entire people of our respective States. We come to these meetings equipped with official experience and we have emerged from contests in which the people have dealt with questions of State policy with respect to legislation as well as administration. Executive recommendations grow in effectiveness because the Chief Executive represents the people at large and not a particular community or district, and there is an increasing tendency to regard him, and to hold him accountable, as the spokesman of the prevailing sentiment.

No legislative leader represents such a constituency, and even a legislative majority rarely rests upon so broad a base of public opinion. Against the scattered exponents of local interests, the State Executive represents in the public mind not simply administrative power, but legislative initiative, and in a peculiar degree, although confined to prescribed functions, he becomes the exponent of State policy.

A Conference of Governors can, therefore, be expected to accomplish much more than conferences of legislative committees or of appointed commissioners. Accord between Executives upon questions which they have carefully considered together cannot fail to be of enormous influence.

Whatever view may be taken of the advisability of extending Federal power or of a wider exercise of existing Federal power it is manifest that the future prosperity of the country must largely depend upon the efficiency of State governments. Proper local administration is a necessary complement of essential Federal administration. National activities inevitably will widen and if we are to prevent an excessive strain upon national administration we must develop our local agencies to their maximum efficiency within their proper spheres. We are fortunate in having our local bases of administration reinforced by sentiment and tradition. And the advantages of our dual system are so great that we should aim to reduce to the fullest extent possible, through mutual intercourse and harmonious action, whatever inconvenience or injustice may result from present methods or laws.

The scope of these conferences may be deemed to embrace at least three groups of questions: The first relates to uniform laws; the second relates to matters of State comity where, if absolute uniformity may not be expected, causes of friction may be avoided and the general welfare may be promoted by accommodating action; the third relates to matters which though of local concern can be better treated in the light of the experience of other States. . . .

At our first conference a question of fundamental importance was presented with respect to the conservation of our natural resources. These ultimate bases of our prosperity must be protected from capture or spoliation. And we should be astute to devise means by which the opportunities of honorable industry may be preserved and extended while the public right is strictly safeguarded. The preservation and care of forests, the creation and maintenance of State reservations, the development of water-

powers, provision of roads and waterways, the promotion of agricultural interests, and various plans for internal improvement demand the best thought of our generation and the wisest methods which may be devised after collaboration and comparative study.

There is the question of financial administration involving taxation and appropriations, or budget making. In every State, I believe, there is pressing need of considering the best means of raising the necessary money to meet state expenditures, of avoiding haphazard allowances and of making systematic provision so that requests for appropriations may be properly scheduled in advance, annual outlays may be compared, and the demands upon the State carefully and impartially analyzed. There is no one of us, I take it, but would like to have the opportunity of learning at first hand the experience of other Executives who are similarly charged with the duty of securing, so far as possible, economical administration.

Then there is the institutional work of the State. We have our schools, charitable institutions, hospitals for the insane, and prisons; and these present important problems both with respect to the aims of philanthropy and the demands of prudent management. Each State here has much to learn and something to teach. Our curative, custodial and correctional methods are improving, but in our efforts to make progress we cannot afford to ignore available experience along the same lines and under similar conditions. Problems are presented with regard to State employment, the extension of the merit system of selection, the financial control of State institutions, and the co-ordination of State work, as to which the interchange of State experience would be of great importance.

It would also be of obvious advantage if we could consider together the principles of State supervision and regulation, and in the case of banks, insurance companies and public service corporations could not only enjoy the benefit of comparative examination of existing methods, but also endeavor so far as may be to relate our State supervisory activities to common standards.

The problems of labor involving those of child labor, of safeguards against injury, of employers' liability and compensation acts, of prison industries, of means to facilitate the arbitration of controversies; the protection of the public health including the prevention of stream pollution and the checking of the ravages of communicable disease; the methods of inferior courts representing to so many of our people nearly all that is known of

order and of justice; our electoral machinery, and the questions relating to the number of elective offices, the nominations of candidates for public office, the form of ballot, campaign contributions, and corrupt practices; the obstacles to the enforcement of the criminal law by crafty means devised to cheat State authority, as for example, in the case of syndicated bucket shops operating in different States; the improvement of municipal administration, and the means of securing efficient local government—these are some of the matters too serious and difficult to be dealt with hurriedly or *en bloc*, but the consideration of which at conferences like these would in the course of time yield results of the highest value to our States.

To secure these benefits in the fullest degree, it is manifest that a continuing organization is desirable. How is this to be supplied? The Governors, for the most part, have short terms, and the membership of the Conference must inevitably change in large measure from year to year. No title or designation can obscure the real character of the Conference or the fact that it is composed of Executives of brief authority each one of whom is independent of and equal to the others, and upon whom no binding rules can be imposed. It must find its strength in harmony and its influence in sound reason commonly recognized.

### 109. STATE LAW AND TREATIES

Within the general scope of their reserved powers, the states may enact laws regulating the rights of aliens residing within their borders. In such cases the aliens affected may claim that the state law undertakes to deprive them of rights secured for them by treaties in force between the United States and the country of which they are citizens. Since, under the Constitution of the United States, treaties are a part of the supreme law of the land, there are only two grounds on which a state law alleged to be in conflict with a treaty can be sustained. The first is that the treaty is invalid because it relates to a matter which is not a proper subject of international negotiation. The second is that there is no conflict between the state law and the treaty. One of the most conspicuous of the state laws and local ordinances which have given rise to international difficulties was the San Francisco school ordinance requiring Orientals to attend separate schools, which was alleged to be in conflict with provisions of a treaty between the United States and Japan. This controversy was ably discussed by Elihu Root.

[Elihu Root, "The Real Question Under the Japanese Treaty and the San Francisco School Board Resolution", *American Journal of International Law*, vol. I, pp. 274-283 (Apr., 1907).]

The treaty of November 22, 1894, between the United States and Japan provided, in the first article:

"... The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territory of the other contracting party, and shall enjoy full and perfect protection for their persons and property. . . .

"In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects or citizens or subjects of the most favored nation." . . .

The statutes [of California] provide in section 1662 of the school law:

"Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district, and the board of school trustees, or city board of education, have power to admit adults and children not residing in the district, whenever good reasons exist therefor. Trustees shall have the power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Mongolian or Chinese descent. When such separate schools are established, Indian, Chinese, or Mongolian children must not be admitted into any other school."

On the 11th of October, 1906, the board of education of San Francisco adopted a resolution in these words:

"*Resolved:* That in accordance with Article X, section 1662, of the school law of California, principals are hereby directed to send all Chinese, Japanese, or Korean children to the Oriental Public School, situated on the south side of Clay street, between Powell and Mason streets, on and after Monday, October 15, 1906."

The school system thus provided school privileges for all resident children, whether citizen or alien; all resident children were included in the basis for estimating the amount to be raised by taxation for school purposes; the fund for the support of the school was raised by general taxation upon all property of resident aliens as well as of citizens; and all resident children, whether of aliens or of citizens, were liable to be compelled to at-



tend the schools. So that, under the resolution of the board of education, the children of resident aliens of all other nationalities were freely admitted to the schools of the city in the neighborhood of their homes, while the children of Indians, Chinese and Japanese were excluded from those schools, and were not only deprived of education unless they consented to go to the special oriental school on Clay street, but were liable to be forcibly compelled to go to that particular school. . . .

It is obvious that three distinct questions were raised by the claim originating with Japan and presented by our national government to the courts in San Francisco. The first and second were merely questions of construction of the treaty. . . .

The other question was whether, if the treaty had the meaning which the government of Japan ascribed to it, the government of the United States had the constitutional power to make such a treaty agreement with a foreign nation which should be superior to and controlling upon the laws of the state of California. A correct understanding of that question is of the utmost importance not merely as regards the state of California, but as regards all states and all citizens of the Union.

There was a very general misapprehension of what this treaty really undertook to do. It was assumed that in making and asserting the validity of the treaty of 1894 the United States was asserting the right to compel the state of California to admit Japanese children to its schools. No such question was involved. That treaty did not, by any possible construction, assert the authority of the United States to compel any state to maintain public schools, or to extend the privileges of its public schools to Japanese children or to the children of any alien residents. The treaty did assert the right of the United States, by treaty, to assure to the citizens of a foreign nation residing in American territory equality of treatment with the citizens of other foreign nations, so that if any state chooses to extend privileges to alien residents as well as to citizen residents, the state will be forbidden by the obligation of the treaty to discriminate against the resident citizens of the particular country with which the treaty is made and will be forbidden to deny to them the privileges which it grants to the citizens of other foreign countries. The effect of such a treaty, in respect of education, is not positive and compulsory; it is negative and prohibitory. It is not a requirement that the state shall furnish education; it is a prohibition against discrimination when the state does choose to furnish education. It leaves every state free to have public schools or not,

as it chooses, but it says to every state: "If you provide a system of education which includes alien children, you must not exclude these particular alien children."

It has been widely asserted or assumed that this treaty provision and its enforcement involved some question of state's rights. There was and is no question of state's rights involved, unless it be the question which was settled by the adoption of the constitution.

This will be apparent upon considering the propositions which I will now state:

1. The people of the United States, by the constitution of 1787, vested the whole treaty-making power in the national government. . . .

Legislative power is distributed: upon some subjects the national legislature has authority; upon other subjects the state legislature has authority. Judicial power is distributed: in some cases the federal courts have jurisdiction, in other cases the state courts have jurisdiction. Executive power is distributed: in some fields the national executive is to act; in other fields the state executive is to act. The treaty-making power is not distributed; it is all vested in the national government; no part of it is vested in or reserved to the states. In international affairs there are no states; there is but one nation, acting in direct relation to and representation of every citizen in every state. Every treaty made under the authority of the United States is made by the national government, as the direct and sole representative of every citizen of the United States residing in California equally with every citizen of the United States residing elsewhere. It is, of course, conceivable that, under pretense of exercising the treaty-making power, the president and senate might attempt to make provisions regarding matters which are not proper subjects of international agreement, and which would be only a colorable—not a real—exercise of the treaty-making power; but so far as the real exercise of the power goes, there can be no question of state rights, because the constitution itself, in the most explicit terms, has precluded the existence of any such question.

2. Although there are no express limitations upon the treaty-making power granted to the national government, there are certain implied limitations arising from the nature of our government and from other provisions of the constitution; but those implied limitations do not in the slightest degree touch the mak-

ing of treaty provisions relating to the treatment of aliens within our territory.

In the case of *Geofroy v. Riggs*, which, in 1889, sustained the rights of French citizens under the treaty of 1800 to take and hold real and personal property in contravention of the common law and the statutes of the state of Maryland, the supreme court of the United States said:

"That the treaty power of the United States extends to all proper subjects of negotiation between our governments and the governments of other nations is clear. . . . The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter without its consent. But with these exceptions it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

3. Reciprocal agreements between nations regarding the treatment which the citizens of each nation shall receive in the territory of the other nation are among the most familiar, ordinary and unquestioned exercises of the treaty-making power. To secure the citizens of one's country against discriminatory laws and discriminatory administration in the foreign countries where they may travel or trade or reside is, and always has been, one of the chief objects of treaty making, and such provisions always have been reciprocal. . . .

4. It has been settled for more than a century that the fact that a treaty provision would interfere with or annul the laws of a state as to the aliens concerning whom the provision is made, is no impeachment of the treaty's authority.

The very words of the constitution, that the judges in every state shall be bound by a treaty "any thing in the constitution or laws of any state to the contrary notwithstanding," necessarily imply an expectation that some treaties will be made in contravention of laws of the states. Far from the treaty-making power being limited by state laws, its scope is entirely independent of those laws; and whenever it deals with the same subject, if inconsistent with the law, it annuls the law. This is true as to any

laws of the states, whether the legislative authority under which they are passed is concurrent with that of congress, or exclusive of that of congress. . . .

5. Since the rights, privileges, and immunities, both of person and property, to be accorded to foreigners in our country and to our citizens in foreign countries are a proper subject of treaty provision and within the limits of the treaty-making power, and since such rights, privileges, and immunities may be given by treaty in contravention of the laws of any state, it follows of necessity that the treaty-making power alone has authority to determine what those rights, privileges, and immunities shall be. No state can set up its laws as against the grant of any particular right, privilege, or immunity any more than against the grant of any other right, privilege, or immunity. No state can say a treaty may grant to alien residents equality of treatment as to property but not as to education, or as to the exercise of religion and as to burial but not as to education, or as to education but not as to property or religion. That would be substituting the mere will of the state for the judgment of the president and senate in exercising a power committed to them and prohibited to the states by the constitution. . . .

## CHAPTER XVII

### THE STATE CONSTITUTION

#### 110. PROVISION FOR CONSTITUTIONAL CONVENTION

A constitutional convention may, as a rule, be called only in accordance with the existing state constitution. Most of these instruments make provision, to some extent at least, for the calling of conventions. However, the lack of such provision does not necessarily prevent the holding of conventions, as in all states but one (Rhode Island) the courts have affirmed the inherent right of the legislature to provide for conventions without specific authorization. In at least one state (North Dakota), the right of the legislature itself to act in effect as such constitutional convention has been upheld.

##### a. Constitutional Provision for Constitutional Convention

[*Illinois Constitution of 1870*, Art. XIV, Sec. 1.]

Whenever two-thirds of the members of each house of the general assembly shall, by a vote entered upon the journals thereof, concur that a convention is necessary to revise, alter or amend the constitution, the question shall be submitted to the electors at the next general election. If a majority voting at the election vote for a convention, the general assembly shall, at the next session, provide for a convention, to consist of double the number of members of the senate, to be elected in the same manner, at the same places, and in the same districts. The general assembly shall, in the act calling the convention, designate the day, hour and place of its meeting, fix the pay of its members and officers, and provide for the payment of the same, together with expenses necessarily incurred by the convention in the performance of its duties. Before proceeding, the members shall take an oath to support the constitution of the United States, and of the State of Illinois, and to faithfully discharge their duties as members of the convention. The qualification of members shall be the same as that of members of the senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the general assembly. Said convention shall meet within three months after such election, and prepare such revision, alteration or amendments of the constitution as shall be deemed necessary, which shall be sub-

mitted to the electors for their ratification or rejection, at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alterations or amendments shall take effect.

### b. Power of Legislature in North Dakota

[Opinion of Attorney General Langer, in *Election Laws of the State of North Dakota, 1921*, pp. 320-325.]

Gov. Lynn J. Frazier, State Capitol, Bismarck, North Dakota.  
Honorable Sir:

I have your request, under date of January 13, 1917, for an opinion as to the legality of House Bill No. 44. This is a Concurrent Resolution, embodying a new or revised Constitution and composed of over two hundred different sections, besides a "Schedule" which provides, among other things, that the proposed Constitution shall be submitted to the people for adoption or rejection at a special election to be held on the last Wednesday in June, 1917.

In giving this opinion I shall confine myself to the single question of the legality of the method of procedure by which this revision is sought to be brought about, and shall make no comment upon the wisdom or expediency of such method or upon the substance of particular sections contained in such resolution.

At first glance and in the light of methods or reasoning applicable to ordinary statutory and constitutional questions, it might seem that the proposed method of revision is illegal, but when viewed in its true light—that of the fundamental principles of our government and of the people's sovereignty—in my opinion, formed after carefully briefing the strongest objections to it, the proposed method of revision is clearly constitutional and the arguments in favor of its legality unanswerable.

An examination of our State and Federal Constitution shows that no procedure for revision or for the adoption of a new State Constitution, as an organic [*sic*], is provided for.

The Constitution of North Dakota, Section 2, however, does contain the following declaration:

"All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people; and they have the right to alter or reform the same whenever the public good may require."

Moreover, in our system of government, constitutions derive their power from the people, not the people from constitutions. The rights and powers of the people existed before a constitution was formed. In other words, before the establishment of a constitution, the people possessed sovereign power.

That power, they still possess, except in so far as they may have delegated it to State or National Governments, or have voluntarily restricted themselves in its exercise under their constitutions. In determining what portion of the sovereign power the people have temporarily parted with under their constitutions, the rule is clear, namely, that the people have delegated no sovereign power unless such delegation of power is set forth in express terms.

In the United States, out of their original sovereign power, the people have carved, first, the Federal Constitution, with its delegation of power to the National Government, and second, the State Constitutions, with their delegations of power to the various state governments. Neither National nor State Governments have any powers except such as are conferred upon them directly, nor are the people restricted in the exercise of their sovereignty, except as they have expressly laid down restrictions in the Federal and State Constitution.

Many of our states have adopted express methods of revising their constitutions through constitutional conventions. However, for generations, many states had no express method of revision, and at least a dozen states, North Dakota being among them, have none today.

However, in view of the admitted theory of the people's sovereignty it is universally agreed that the people of a state do have the inherent power to revise their constitutions, that is, to adopt a new and complete organic law, even though no special method for the exercise of such power is prescribed in the existing constitution.

The power of revision being thus conceded on all sides, the question then arises as to how states without any express method of revision could in the past, or can today, proceed to revise their constitutions.

The answer to this question is that the people of such states, being without practical facilities to convene as a body and initiate new constitutions themselves, have in their legislatures, instruments through which the initiative may be taken to bring before the people, for ratification or rejection, new and revised constitutions. This practice is inevitable, and is founded upon the

broad right of the people to retain their inherent power of revision unstified by a mere lack of express methods of procedure for revision.

In initiating revision and in setting in motion machinery by which revision is placed before the people so that they may act upon them in their sovereign capacity, it is conceded on all sides that legislatures do not act in a strictly legislative capacity, but are of necessity for the time being mere instruments for setting in motion the sovereign power of the people.

This right of the legislature is conceded by every authority on constitutional law, upon the simple ground of necessity. The sovereign power by the people works to that extent through the legislature, as the human body breathes through the mouth or nostrils for the reason that no other method of breathing is provided by nature. Thus far authorities are in harmony and there is no ground for dispute.

Bearing these facts in mind:

1. That the people, in the absence of express provisions as to procedure in their constitutions, nevertheless, have the right of revision, and

2. That the initial step to start the sovereign power in motion must under circumstances be taken by state legislatures, the question further narrows down to the particular method which a state legislature must pursue in initiating a revision.

This, in my opinion, brings us to the crucial point of the entire question.

In cases where constitutions contain no express provision for procedure and no express restriction on procedure, and where it is conceded that the people have the power to revise their constitutions, as well as that the legislature must initiate such revision by one method or another, IN MY OPINION ANY METHOD FOLLOWED BY THE LEGISLATURE IN PLACING BEFORE THE PEOPLE A NEW CONSTITUTION FOR ADOPTION OR REJECTION IN THEIR SOVEREIGN CAPACITY IS LEGAL. Any other conclusion is a denial of the sovereign power of the people or a partial restriction of that power utterly unwarranted by our Constitution and accepted rules of constitutional interpretation. It would be in direct contravention of our American theory that popular sovereignty is restricted in the exercise of its powers only by express written prohibitions contained in constitutions, as set forth in the first section of this opinion.

The truth is that the argument in favor of revision by constitutional convention as opposed to revision by commission or



legislative action is not an argument of legality, but solely of expediency. The possible greater expediency or wisdom of the convention method has been mistaken by its advocates for exclusive legality.

Dodd, in his authoritative work, the Revision and Amendment of State Constitutions, page 261, has stated this point clearly and conclusively:

“Judge Jameson has said as to the legislative method of proposing amendments: ‘It ought to be confined, it is believed, to changes which are few, simple, independent, and of comparatively small importance. For a general revision of a Constitution, or even for single propositions involving radical changes as to the policy of which the popular mind has not been informed by prior discussion, the employment of this mode is impracticable, or of doubtful expediency.’ Judge Jameson’s point is purely one as to expedience, and it is legally proper, it would seem, in the absence of specific constitutional restrictions, to propose to the people by the legislative process any constitutional alteration short of a complete revision, or even complete revision.”

The real merit of revision by convention over legislative revision appears to lie in the fact that the constitutional convention, elected solely upon the issue of revision, is likely to be more carefully selected, to contain a greater number of men specially fitted for the task and to approach its task with greater deliberation and more concentrated energy. This may all be true. The same consideration probably will hold good in connection with revision by a commission appointed by the legislature, and yet all these considerations merely go to the expediency of the method, not to its legality.

When once we concede that the legislature has authority to set in motion this great sovereign power of the people by initiating revision, then, upon the mere ground of reasoning by implication and without written authority, who are we to say the sovereignty of the people shall from thence on be exercised only in one certain narrow way? We may say that it is inadvisable, that it is unwise, that it is inexpedient, for it to be exercised in that manner, BUT WE ARE UNABLE IN THE LIGHT OF AMERICAN INSTITUTIONS, TO SAY THAT IT CANNOT BE SO EXERCISED.

The sovereign power of revision having reached the threshold of the legislature without express written authority and solely by its irresistible right to expression what mysterious power can then, without vestige of authority, assume the right to bridle it and lead it tamely down the narrow, though highly respectable avenue of revision by convention?

Any other conclusion as to the rule under our constitution must wrongfully seek by mere implication to restrict the sovereign power of revision to the narrow channel of constitutional conventions. The ground for conceding to the legislature the right to initiate revision is the compelling power of necessity, no other method being provided. No such necessity exists to restrict the sovereign power as to any particular method of revision through the initiative or the legislature. In fact, such a restriction would rest upon the most doubtful reasoning (as to legally distinguished [*sic*] from expediency). Opposed to it would be the inherent right of the people to secure the freest possible expression of their sovereign power. Under these circumstances, and, in the absence of any written restriction to the contrary, every presumption of legality is in favor of whatever method the legislature may adopt and such method will prevail.

It is urged, that since our Constitution provides a method of amendment, by exclusion the Legislature is prohibited from initiating a revision itself by drafting a new Constitution. This argument is untenable when dealing with sovereignty of the people seeking expression through revision. It is an instance where the ordinary doctrine of exclusion, applicable to contracts is not binding. Moreover, if such an argument were applicable to legislative revision it would be equally applicable to revision by convention, and on that subject our own Supreme Court in 68 N. W. 421 (N. D.), has said:

"The decided weight of authority and the more numerous precedents are arrayed on the side of the doctrine which supports the existence of this inherent legislative power to call a constitutional convention, notwithstanding the fact that the instrument itself points out how it may be amended."

A revised constitution, in the sense applicable to this question, is a constitution, altered in part or changed completely, but in form a complete document and to be submitted as a whole and standing or falling as a whole. Amendments relate to particular sections, and are submitted as such to be voted upon separately. It is the submission of a document as an organic whole which distinguishes a revised and new constitution from mere amendments.

In connection with this I will also say that the case of *Ellingham vs. Dye*, 99 N. E. 1, apparently opposed to the legality of legislative revision, is clearly not applicable to the situation in this State, owing to an unusual and perhaps, entirely unique occurrence in the history of Indiana when the provisions for

revision contained in the Indiana constitution up to 1851 were then stricken out with the express intention that NEVER AGAIN WOULD THE INDIANA CONSTITUTION BE REVISED BUT ONLY CHANGED BY AMENDMENT.

In the future the people of North Dakota may decide that this method of legislative revision is unwise, inexpedient, or overhasty. Speaking through their sovereign power under the Constitution, the people may prohibit this method of revision. With that side of the question, in this opinion, I have no concern and hence made no comment thereon. I merely state my conclusion as to the bald legal right to revise the Constitution by this method under our institutions as they exist today. As yet the people of North Dakota have not seen fit to prohibit this method of legislative revision. Hence, I am of the opinion that the method of revision proposed in House Bill No. 44 is legal.

If there is any doubt about the matter it is resolved in favor of the legality of the method proposed, by a principle of supreme and controlling force, a principle which has been set out by Jameson, the great authority upon constitutional questions.

"But in practice, where doubt arises, and there is nothing to indicate decisively the intention of those who framed the instrument, perhaps the people, assuming to exercise power under one construction, rather than another, should be given the benefit of the doubt. It is questionable policy to attempt, by abstract rules of law in doubtful cases, to prevent or to control great organic movements of the people." Jameson Con. Con., page 603.

Respectfully,

D. V. BRENNAN,  
Assistant Attorney General.

Submitted with my full approval.

WILLIAM LANGER,  
Attorney General.

## 111. CALL FOR A CONSTITUTIONAL CONVENTION

The usual procedure in calling a constitutional convention is as follows: (1) The legislature passes a resolution submitting to the people the question as to whether a convention shall be held; (2) the governor proclaims the result of the popular vote upon this question; (3) if the vote is favorable, the legislature then passes an act providing for the election of the delegates and the assembling of the convention. These three steps may be illustrated by the following three documents respectively regarding the Illinois constitutional convention of 1920-22.

### a. Legislative Resolution of Submission

[*Laws of Illinois, 1917, p. 805.*]

Whereas, The provisions of the Constitution of this State are in many respects inadequate to the present and prospective needs of the people; and

Whereas, By its provisions it is not possible to submit to the people a proposition to amend more than one article of the Constitution at the same time; therefore, be it

*Resolved*, by the Senate, the House of Representatives concurring herein, That a convention is necessary to revise, alter or amend the Constitution of this State, and that the question of the calling of such convention shall be submitted to the electors of this State at the next general election, as provided for in article 14 of the present Constitution.

Adopted by the Senate January 24, 1917.

Concurred in by the House of Representatives March 14, 1917.

### b. Governor's Proclamation

[*Proceedings of the Constitutional Convention, State of Illinois, 1920-1922, vol. I, p. 5.*]

Whereas, The Fiftieth General Assembly of the State of Illinois passed a Joint Resolution proposing the calling of a Constitutional Convention (which said resolution was adopted by the Senate by two-thirds vote, January 24, 1917, and concurred in by the House by two-thirds vote March 14, 1917), for the submission to the electors of this State for adoption or rejection at the next election of Members of the General Assembly of the State of Illinois, to be held on the fifth day of November, A. D. 1918, which said election was the next election for Members of the General Assembly ensuing the passage of said Joint Resolution;

And Whereas, The said proposition for calling of a Constitutional Convention was duly published in two newspapers at the seat of government at least three months before the holding of said election on the fifth day of November, A. D. 1918, and notice of said election for the submission of said proposition was given as the law provided;

And Whereas, The said proposition was submitted to the electors of the State, the ballots canvassed and returns made to the Secretary of State, all in conformity to law;

And Whereas, In pursuance of law, the State Officers appointed to canvass the returns of said election and to declare the result thereof, did, on the 25th day of November, A. D. 1918, and between that date and this, the 30th day of November, A. D. 1918, in my presence, proceed in pursuance to law to open and canvass the returns of the votes for the adoption or rejection of said proposition, and it appearing, as a result of the canvass of the votes given at the above named election for and against the adoption of the proposition for the calling of a Constitutional Convention, that the total number of men's votes cast at said election was 975,545; that the total number cast for the adoption of said proposition was 562,012; that the total number of votes cast against said proposition was 162,206; that a majority of all the men's votes cast at said election was cast in favor of the adoption of said proposition for the calling of a Constitutional Convention; the majority of the said Board of Canvassers having declared that the proposition aforesaid was adopted;

Now, Therefore, I, FRANK O. LOWDEN, Governor of the State of Illinois, in conformity to the statute in such case made and provided, do hereby make public proclamation declaring as the result of the canvass aforesaid made by a majority of the said State Board of Canvassers that the proposition aforesaid was adopted by virtue of having received a majority of all the men's votes cast at said election, and that said proposition was adopted.

(SEAL) In Testimony Whereof, I have hereto set my hand and caused to be affixed the Great Seal of State.  
Done at the Capitol in the City of Springfield,  
Illinois, this 30th day of November, A. D. 1918.

FRANK O. LOWDEN

*Governor of the State of Illinois.*

By the Governor:

LOUIS L. EMMERSON

*Secretary of State of the State of Illinois*

Filed November 30, 1918.

Louis L. Emmerson,

*Secretary of State.*

### c. Legislative Convention Act

[*Laws of Illinois, 1919, pp. 60-63.*]

*An Act to assemble a convention to revise, alter or amend the Constitution of the State of Illinois.*

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly:* That at the hour of 12 o'clock noon, on the sixth day of January, 1920, a convention to revise, alter or amend the Constitution of the State of Illinois shall meet in the hall of the Representatives of the General Assembly in the capitol building, in the City of Springfield. The Secretary of State shall take such steps as may be necessary to prepare the hall of the Representatives for the meeting of the convention.

SECTION 2. The convention shall consist of one hundred and two delegates. Two delegates shall be elected in and from each district entitled by law to elect a senator to the General Assembly. Delegates shall possess the same qualifications as State senators. The Governor, or the person exercising the powers of Governor, shall issue writs of election to fill vacancies in the convention.

SECTION. 3. A primary election for the nomination of candidates for the position of delegate shall be held on the tenth day of September, 1919. All provisions of law in force at such time, and applying to the nomination of candidates for the office of State senator, shall to the extent that they are not in conflict with the terms of this Act, apply to the primary election herein provided for.

Vacancies created by the death of, or the declination of the nomination by any person nominated as a candidate for the position of a delegate, shall be filled in the manner provided by law for the filling of similar vacancies occasioned by the death of, or declination of the nomination by any person nominated as a candidate for the office of State senator.

Independent nominations for the position of delegate may be made in the manner now provided by law for the nomination of independent candidates by petition.

SECTION 4. The delegates shall be chosen at an election to be held on the fourth day of November, 1919. Such election shall be conducted in conformity with the laws then in force relating to elections for State senators, to the extent that such laws are applicable.

All votes cast in the election for delegates shall be tabulated, returned and canvassed in the manner then provided by law for the tabulation, return and canvass of votes cast in elections for State senators.

The official or officials, charged with the duty of issuing certificates of election to persons elected to the office of State senator,

shall issue certificates of election to all persons duly elected as delegates.

Election contests for membership in the convention shall be heard and determined by the convention.

SECTION 5. Each delegate before entering upon his duties as a member of the convention, shall take an oath to support the Constitutions of the United States and of the State of Illinois, and to discharge faithfully his duties as a member of the convention. In going to and returning from the convention and during the sessions thereof the delegates shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest; and they shall not be questioned in any other place for any speech or debate in the convention.

SECTION 6. Each delegate shall receive for his services the sum of two thousand dollars, payable at any time after the convention is organized. The delegates shall be entitled to the same mileage as is paid to the members of the General Assembly, to be computed by the Auditor of Public Accounts. The delegates shall receive no other allowance or emoluments whatever, except the sum of fifty dollars to each delegate, which shall be in full for postage, stationery, newspapers, and all other incidental expenses and perquisites. The pay and mileage allowed to each delegate shall be certified to by the president of the convention and entered on the journal of the convention.

SECTION 7. The convention shall determine the rules of its procedure, shall be the judge of the election, returns, and qualifications of its members, and shall keep a journal of its proceedings.

The Governor shall call the convention to order at its opening session and shall preside over it until a temporary or permanent presiding officer shall have been chosen by the delegates.

The delegates shall elect one of their own number as president of the convention, and they shall have power to appoint a secretary and such employes as may be deemed necessary. The secretary shall receive a compensation of fifteen dollars (\$15.00) per day. The employes of the convention shall receive such compensation as shall be determined upon by the convention.

SECTION 8. The proceedings of the convention shall be filed in the office of the Secretary of State. The revision or alteration of, or the amendments to the Constitution, agreed to and adopted by the convention, shall be recorded in the office of the Secretary of State.

The revision or alteration of, or the amendments to the Con-

stitution, adopted by the convention, shall be submitted to the electors of this State for ratification or rejection, at an election appointed by the convention for that purpose, not less than two months, nor more than six months after the adjournment of the convention. The convention shall determine the manner in which such revision, alteration or amendment shall be submitted to the electors. The convention shall prescribe the manner and form in which such revision, alteration or amendments shall be published prior to the submission thereof to the electors. No such revision, alteration or amendments shall take effect unless approved by a majority of the electors voting at such election.

The convention shall designate or fix the day or days upon which such revision, alteration or amendments, if adopted by the voters, shall become effective.

SECTION 9. Notices of the election to be called by the convention shall be given in the manner and form prescribed by the convention. The convention shall prescribe the manner and form of voting at such election, and the ballots for use in such election shall be printed accordingly, by the officials charged with the duty of printing ballots for use in general elections.

The votes cast at such election shall be tabulated, returned and canvassed in such manner as may be directed by the convention.

SECTION 10. Every person who, at the time of the holding of any primary or other election provided for in this Act, is a qualified elector under the Constitution and laws of this State, shall be entitled to vote in such election.

The primary and other elections provided for in this Act shall be conducted by the officials, judges and clerks charged with the duty of conducting general elections.

All laws then in force in relation to the registration of voters in primary and general elections, and all laws then in force for the prevention of fraudulent and illegal voting, shall be applicable to the primary and other elections provided for in this Act.

All laws in force governing elections and not inconsistent with the provisions of this Act, or with powers exercised under the terms hereof, shall apply to and govern elections held under the terms of this Act.

SECTION 11. The convention shall have power to punish by imprisonment, any person, not a member, who shall be guilty of disrespect to the convention, by disorderly or contemptuous behavior in its presence. But no such imprisonment shall extend beyond twenty-four hours at any one time, unless such person



shall persist in such disorderly or contemptuous behavior. Commitments for disorderly or contemptuous behavior in the presence of the convention shall be made in the manner now provided by law for the commitment of persons guilty of disrespect to the General Assembly.

SECTION 12. It shall be the duty of all public officers to furnish the convention with any and all statements, papers, books, records and public documents that the convention shall require. The convention, and its committees, shall have the same power to compel the attendance of witnesses, or the production of papers, books, records and public documents, as is now exercised by the General Assembly, and its committees, under the provisions of an Act entitled, "An Act to revise the law in relation to the General Assembly," approved and in force February 25, 1874.

SECTION 13. The sum of five hundred thousand dollars (\$500,000), or so much thereof as may be necessary, is hereby appropriated for the payment of salaries and other expenses properly incident to the constitutional convention. The Auditor of Public Accounts is hereby authorized and directed to draw warrants on the State Treasurer for the foregoing amount or any part thereof, upon the presentation of itemized vouchers certified to as correct by the president of the constitutional convention or the acting president of the convention. All printing, binding, stationery and other similar supplies for the constitutional convention shall be furnished through the Department of Public Works and Buildings.

Approved June 21, 1919.

## 112. PROCEDURE AND RULES OF CONSTITUTIONAL CONVENTIONS

The success or failure of a constitutional convention may depend largely upon the character of the rules adopted and the methods of procedure followed. A discussion of these questions in the light of experience was prepared for the benefit of the Illinois Constitutional Convention of 1920-22, and served as an excellent guide to that Convention.

[*Illinois Constitutional Convention Bulletins, 1920, pp. 23-30.*]

**Submission of convention's work:** The procedure of the convention will vary somewhat in accordance with the number of changes to be made in the Constitution and with the method of submitting the convention's work to popular vote. The convention of 1869-70 submitted its work in the form of nine separate

proposals, one proposal containing a revised constitution and the eight other proposals constituting the more seriously controverted problems acted upon by the convention.

The convention of 1869-70 set a wise precedent for the convention of 1920. There will be a number of issues before the convention of 1920 which are seriously controversial in character and upon which the people will wish an opportunity and should have an opportunity to express themselves separately. On the other hand, there are a number of non-controversial matters in the present Constitution which need to be changed, and to submit each of these matters as an independent proposition would be useless, and would place an unreasonable burden upon each voter. Such non-controversial matters might well be submitted as a unit in a revised constitution, if the convention sees fit to do this. Under this plan the voters would be able to pass as a unit upon non-controversial matters and to pass separately upon each matter of a controversial character or of distinct popular interest. It would be foolish to submit a series of separate propositions to the voters as to such matters as the amendment of prior laws by reference to their titles, the reading of bills three times in each house of the general assembly, etc.

The Ohio convention of 1912 submitted 42 separate constitutional changes to the people. The Massachusetts convention of 1917-19 submitted three questions to be voted upon at one election and nineteen questions to be voted upon at another election. With forty-two questions submitted, the plan of separate submission becomes too burdensome, but there should be no difficulty about submitting to the voters of Illinois each controversial question separately and the non-controversial matters as a single unit.

The long intervals which elapse between the meetings of constitutional conventions make it desirable that the convention should undertake a complete re-examination of the existing constitution in order to make changes either of addition or of omission which may have become necessary since the framing of the present Constitution. However, such a complete re-examination can be had, and the work of the convention submitted without the undue multiplication of issues to be separately presented to the voters.

**Length of conventions:** The political situation in the year 1920 makes it desirable that the convention should complete its work and submit its proposals to the people as promptly as possible. A presidential year is not a good one in which to submit matters which should be deliberated upon carefully by the voters, even

though the questions are to be submitted at a special election. It is desirable if possible that the convention's work be passed upon by the people before the excitement of the State primary and of the presidential campaign.

The convention of 1869-70 assembled on December 13, 1869, and adjourned on May 13, 1870, but took a recess from March 7 to April 12, 1870. In the convention of 1870 a great deal of time was wasted in the preliminary organization, primarily because of the discussion of the oath to be taken by the delegates. There seems to be no reason why the convention of 1920 should not be able to organize promptly and to complete its work within a period of four months.

**Rules and committee organization:** With a single specific object before it, a convention should adopt rules primarily for the purpose of accomplishing the following purposes: (1) to obtain full debate upon and deliberate consideration of each proposal of constitutional change; (2) to assure that every important proposal is disposed of only in accordance with the affirmative wishes of the convention; and (3) to have the work of revision or amendment carefully phrased for submission to the people, without an undue prolongation of the session of the convention.

In a convention, as in a legislative body, the organization of committees is the most essential problem. In the framing of a constitution it may be possible for a convention to conduct all of its work directly in convention, that is, acting as a body without going into committee of the whole or dividing the work among committees. But such a plan would be cumbersome and unsatisfactory, and has not been employed. In the use of committees conventions have employed three methods: (1) the transaction of business mainly in committee of the whole, with perhaps some smaller committees appointed to handle particular matters; (2) the appointment of one small committee with power to draft a proposed constitution and submit it for the consideration of the whole convention, either in committee of the whole or otherwise; (3) the appointment of a number of committees and the apportionment among them of the subjects to be covered by the constitution, such committees to report to the convention, as such, or to the convention in committee of the whole.

The more usual practice has been for a convention to appoint a number of committees and to distribute among them the several parts of the constitution, to be considered and reported upon to the convention either in regular session or in committee of the whole. The number of committees appointed for such a purpose

has varied considerably, running from four in one case to more than thirty in others.

The number of committees will, of course, vary with the work to be done by a convention, but if all parts of a constitution are to be examined with care there should be a separate committee for each important subject. Separate committees will also be necessary to deal with questions which are at the time of great popular interest, because an effort will naturally be made to have these subjects dealt with in the constitution. For example, should a convention be assembled in Illinois, it would be appropriate to have a separate committee upon the initiative and referendum. The New York convention of 1894 had thirty-one committees; the New York convention of 1915, thirty committees; the Virginia convention of 1901-02, sixteen committees; the Michigan convention of 1907-08, twenty-nine committees; the Ohio convention of 1912, twenty-five; the Massachusetts convention of 1917, twenty-four. The Illinois convention of 1869-70 had thirty-nine committees, a number much larger than was needed. Of these committees six made no report whatever to the convention, and because of the lack of care in planning the scope of committees, several committees were considering and reporting upon the same subjects. A much more satisfactory distribution of the work could have been made in the Illinois convention of 1869-70 had there been fewer committees; for example, there were separate committees on canals and canal lands, internal improvements, roads and internal navigation, which might well have been consolidated into one; and in several cases there were two separate committees to deal with closely related subjects, both of which were relatively unimportant from a constitutional standpoint. Upon the proper organization of committees and a proper distribution of work among them depends to a large extent the success of a convention.

The size of committees must, of course, vary. The number and size should be such that each member may have some committee service, but each member should not be burdened with service upon four committees, as in Illinois in 1869-70. Somewhat the same situation existed in the Ohio convention of 1912. The size of a committee must depend somewhat upon the function which it is to perform. For a convention there may be said to be three types of committees: (1) those on the formal business of the convention, such as committees on rules, printing, etc.; (2) those whose functions are largely technical, such as a committee on phraseology and style; (3) those whose function would be largely

that of obtaining agreement upon broad questions of principle, such as might be to a large extent a committee dealing with the subject of municipal home rule. Of course, most committees will have duties of all three types, but some difference in size is justified. Committees of the first type should naturally be small; those of the second type may well be larger, but even for the third type committees of more than fifteen members are apt to work ineffectively. The average size of committees in the Ohio convention of 1912 was seventeen, and a number of committees had 20 or 21 members. Because of this the committee work was less effective than it might have been. There is a tendency to organize either a legislative body or a convention into too many committees and into committees each of which is too large for effective work. In the New York Convention of 1915 a large number of the committees had seventeen members each, and in the Massachusetts Convention of 1917 most of the committees were composed of fifteen members.

Committees are, of course, organs of the convention, appointed for the purpose of maturing matters for consideration by that body. A committee should, therefore, be subject at all times to control by a majority of the convention, and should have no power (by failing to report upon any matter) to prevent its consideration by the convention. Abuse of committee power is not apt to occur in a convention, but the rules should be so framed as to prevent the possibility of such abuse. In the New York Convention of 1894 there was the following rule: "Whenever a committee shall have acted adversely on any proposed amendment to the constitution such committee need not report such adverse determination, unless requested in writing by the member introducing such amendment so to do and it was determined (by the committee) in the affirmative." However, in this convention any matter might be recalled from a committee by the majority action of the convention; and a similar rule for recalling matters from a committee existed in the Michigan Convention of 1907-08, the New York Convention of 1915, and the Alabama Convention of 1901-02. In the Michigan Convention of 1907-08, there was a rule that "all standing committees before reporting adversely on any proposal shall notify the member presenting such proposal when and where he may meet such committee to explain the same."

In the Ohio Convention of 1912, there was a rule which read as follows: "Any time after two weeks from the time when the convention shall have committed any proposal to any committee,

a report thereon in the meantime not having been made by said committee, the author of such proposal may, when no other business is pending and in any order of business, demand that such proposal be reported back to the convention; and such demand when so made shall be deemed the action of the convention, and the proposal is at once before the convention subject to all rules of procedure as before. Provided, however, that this shall not apply to a member whose proposal has passed its second reading and has been referred (to the committee on arrangement and phraseology). The convention by a majority vote may demand the forthwith report of any proposal that has been committed to any committee."

In the Arizona Convention of 1910 committees were required to report upon each proposal referred to them within eight days after the day of reference, unless otherwise ordered by the convention. In Massachusetts in 1917 all proposals of amendment were required to be submitted to the convention by June 25, and all committees were required to file their reports upon such proposals of amendment by July 16. The New York convention of 1915 regarded it as sufficient to require that "the several committees shall consider and report without unnecessary delay upon the respective matters referred to them by the convention." The Arizona rule is unwise. Upon any important matter a number of proposals will be introduced and referred to a committee. The committee in framing a proposed constitutional provision upon the matter should consider all the proposals, and should report upon the matter as a unit. Any rule requiring a report upon each separate proposal within a limited time would greatly handicap the work of committees.

The form of committee proceedings and of committee reports ought to be left to the committees themselves. It has been urged in some conventions that committees should confine their reports to recommended clauses or articles without giving reasons for such recommendations. Where a recommendation relates to a change in existing constitutional provisions explanation is, however, usually desirable and should be given. A committee report should in all cases indicate what changes in an existing constitutional provision are being recommended.

Committees have ordinarily been appointed by the president of the convention, and this is the more satisfactory arrangement. As has been suggested, partisanship should be absent from the deliberations of a convention, but this, unfortunately, is not always the case, and where the person chosen as president is

elected because of distinct partisanship the power of appointment is apt to be abused. In the New Mexico convention of 1910 the person chosen as president was a railroad attorney and apparently because of the fear that the convention might be charged with being under the control of corporations the appointment of committees was vested in a committee chosen by the convention itself.

**Introduction of proposals:** The committees must do the detailed work of the convention and each committee should have before it as soon as possible all of the proposals relating to the subject which it is to consider. In order to accomplish this purpose conventions have often definitely agreed that after a certain date no proposals should be entertained unless presented by one of the standing committees. In the New York convention of 1915 (which met on April 6) no proposed constitutional amendment could be introduced after June 11, except on the report or recommendation of a standing or select committee. The Massachusetts convention of 1917 met on June 6, and proposals of amendments were required to be presented by the close of the day of June 25. In the Ohio convention of 1912 the rules made the introduction of proposals more difficult after the first two weeks of the session. Members will usually present their proposals as soon as possible, because early introduction may make a proposal more influential, but some rule is necessary in order that committees shall have all proposals before them in the early days of a convention.

Many convention rules have very properly prescribed the form in which proposals shall be introduced, requiring that all proposals be in writing, contain but one subject and have titles. In the Ohio convention of 1912 all proposals were required to be presented in duplicate.

**Committee of the whole:** With respect to the general conduct of a convention's work the committee of the whole has been found a convenient instrument. In the Alabama convention of 1901, where this committee was not employed, there was much wrangling over rules and points of order. In the Virginia convention of 1901-02 objection was made to the committee of the whole on the ground that its use would lead to repetition of debate upon each subject, an objection which finds support in the Kentucky convention of 1890-91, but this objection is more than counterbalanced by the simpler method of procedure in committee of the whole. A committee of the whole, completely unrestricted, is probably undesirable, but a simpler procedure may be had in committee of the whole, and the convention may at the same time

adopt rules which place some limitation upon acting in committee of the whole. The rules of the Michigan convention of 1907-08 seem fairly satisfactory for this purpose. "The rules of the convention shall be observed in committee of the whole, so far as they are applicable, except that the vote of a majority of said committee shall govern its action; it cannot refer a matter to any other committee; it cannot adjourn; the previous question shall not be enforced; the yeas and nays shall not be called; a motion to indefinitely postpone shall not be in order; a member may speak more than once. A journal of the proceedings in the committee of the whole shall be kept as in convention." A similar rule existed in the Ohio convention of 1912. The important portion of this rule is that requiring that a journal be kept of proceedings in the committee of the whole. Stenographic reports should also be made of debates in committee of the whole, as well as of debates in the convention.

**Limitation of debate:** Most conventions have begun their work practically without limitation of debate, although the previous question has been permitted. In the Michigan convention of 1907-08 any member could move the previous question but must be seconded by ten members and it could be ordered by a majority of those present and voting. In the Ohio convention of 1912 a two-thirds vote was necessary to sustain the previous question. In the New York convention of 1894 several rules limited debate. The previous question could be carried by a majority vote, and the committee on rules could, when ordered by the convention, report a rule limiting debate upon a particular question.

Obstructive tactics seem to have been resorted to by the minority in the New York convention of 1894 and a rule was finally brought in and adopted denying the ayes and noes on formal and dilatory motions. The Michigan convention somewhat late in its session limited the length of speeches in committee of the whole, and the Illinois convention of 1869-70 found it necessary to adopt a similar limitation. In the South Carolina convention of 1895 the expedient was adopted late in the session of appointing a steering committee, to apportion the time and direct the work of the convention.

Convention debate should be free enough to allow adequate consideration of every proposal, but experience has shown that if a convention starts its deliberations without any limitations upon debate a large portion of the time is likely to be taken up with excessive debate upon the earlier questions presented, so that the later work of the convention must be unduly rushed. It is wise



for a convention to impose a moderate limitation upon debate at the outset, and such a limitation should exist not only for the convention itself but also for action in committee of the whole.

In the Michigan convention of 1907-08 the first committee appointed was one on permanent organization and order of business. This committee was afterward made permanent. It reported the plan of committee organization and made other reports during the session of the convention. One of its recommendations, which was adopted, provided for a weekly meeting of the chairmen of committees, to be presided over by the president of the convention, "at which meeting the chairmen of the several committees shall report progress and consider such other matters as may be of interest in advancing the work of the convention." Such a plan, if properly carried out, should do much to unify the work of a convention. In any organization of a convention there should be some central organization which will effectively direct the work and prevent loss of time. Much of the usual loss of time may be avoided by careful consideration in the first instance of the rules under which a convention is to proceed.

**Editorial committee:** A committee on phraseology and style is perhaps the most important single committee of a convention. Practically all conventions have had a committee of this type but the name of the committee has varied. In the Federal convention of 1787 there was a committee on style, and in the Illinois convention of 1869-70 there was a committee on revision and adjustment. A recess has often been taken by the convention so as to allow sufficient time for the work of this committee. In the greater number of conventions the committee on phraseology and style has been merely a proof-reading committee, and in some cases fear has been expressed lest this committee change the sense of proposals adopted by the convention. However, a committee is needed to do something more than the mere editorial work of removing inconsistencies in sense and language. The work of a convention is necessarily made up from reports of a number of committees and the proposals presented will naturally lack consistency in draftsmanship. The committee on phraseology and style should serve in large part as a central drafting organ to give unity to the work of a convention.

In the Michigan convention of 1907-08 effective use was made of a central drafting committee. Proposals introduced by members were read and referred to the appropriate committee; when reported by the committee they were taken up in committee of the whole, and when reported upon by the committee of the whole,

were referred to a committee on arrangement and phraseology. The proposal when reported upon by this committee, was put upon its second reading and after second reading was voted upon. If adopted, it was again referred to the committee on arrangement and phraseology, which, after all proposed amendments had been considered, reported the complete revision as agreed upon, the convention taking a twelve-day recess in order to give time for this work. This revision was then considered by sections in the committee of the whole, was reported to the convention and was then put upon the third reading and voted upon by articles and as a whole. This procedure gave four different opportunities for the discussion and amendment of every proposal. But more important, it gave the committee on arrangement and phraseology great influence by allowing it an opportunity to revise the language of each proposal after it was agreed to in committee of the whole and before it was definitely adopted; proposals so revised came again to this committee to be consolidated into a complete constitution. As a result of this care the Michigan constitution of 1908 is the best drafted of recent state constitutions.

A somewhat similar use of its committee on phraseology and style was made by the Ohio convention of 1912. The consideration upon second reading was primarily upon the substance, and thereafter the proposal went to a committee on arrangement and phraseology and after the report of this committee it was presented for final action. The Ohio committee presented its reports in such a manner that each member of the convention had before him the original form of proposal adopted by the convention, the changes recommended by the committee, and the proposal as it would read if such recommendations were adopted.

In the Illinois convention of 1869-70 the committee on revision and adjustment was largely limited to detailed changes in language. The New York convention of 1915 and the Massachusetts convention of 1917-19 are of interest as presenting a fairly effective use of a similar committee. Of recent conventions those of Michigan (1907-08), Ohio (1912), and New York (1915), had the most satisfactory rules.

The rules of the New York convention of 1894 were based too much upon partisan considerations. The rules of the Massachusetts convention of 1917-19 are open to objection in that they allow absolute freedom of debate in committee of the whole, and tend to permit too great a degree of debate upon the measures first presented to the convention.

## 113. ADDRESS OF SUBMISSION

When a constitutional convention completes its labors and is ready to submit to the people the draft of a new constitution, it usually accompanies such draft with an address to the people setting forth the reasons why, in the opinion of the convention, the proposed constitution should be adopted. The address accompanying the proposed Illinois Constitution of 1922 is given, in part, in the following selection.

*[Proposed New Constitution of Illinois, 1922, With Explanatory Notes and Address to the People, pp. 5-6, 19-20.]*

ADDRESS TO THE PEOPLE  
OF THE  
STATE OF ILLINOIS

Adopted by the Constitutional Convention,  
September 12, 1922

To the People of Illinois:

Changed conditions and increasing knowledge demand from time to time adjustments in the mechanism of government.

In 1869 the people of this State, already dissatisfied with the Constitution adopted only twenty-one years earlier, elected a Convention to recommend a new Constitution. These men wrought well and in the following year their work was approved at the polls. For fifty-two years, under the Charter then adopted, Illinois has lived and prospered.

As new conditions and increased experience had before dictated change, so in 1918 the people, again persuaded that revision was required, voted for the calling of a Constitutional Convention and in the following year elected one hundred and two delegates charged with the duty of consulting together and of reporting back to those who had elected them. The men of this Convention came from every part of the State and from many different walks in life. On almost every important question there developed among them wide difference in opinions, opinions often tenaciously held and only reluctantly yielded. Now after many months of labor and many other months of recess, during which differences have lessened and heat has cooled, there has come practical unanimity among the delegates and they join in recommending to the people of Illinois a Constitution as it has been hammered out in their deliberations.

It is not to be pretended that the instrument is perfect, or even that it represents all the hopes and wishes of any one man or of any group of men. It is, as was the Federal Constitution

and as all such measures must be, the result of compromise. No voter should approach its consideration with the mind to compare it with his ideal, for this is to condemn it in advance. Nor should it be an objection that some desired provision is not found within its pages, unless that provision is in the old instrument. The real and only question presented to the people of Illinois is: Is this proposed new Constitution, framed by your representatives, better than the Constitution under which you now live?

This question must be put and answered in view of the welfare of the whole State and all her population. So, too, it must be put and answered in the knowledge that a Constitution is not, and does not pretend to be, a statutory code. It is the function of a Constitution only to provide for the form of government, to define the powers and duties of the principal agencies of that government, and to put such limitations upon the powers of the government itself as experience has shown are necessary to the preservation of liberty. Under our system, the legislature has all power not denied to it or expressly given to other agencies and so to the legislature must be left the working out of the details of law. When the legislature makes a mistake, it can be speedily and easily remedied, while mistakes in the Constitution are much more difficult of cure. For these reasons the Convention has wisely confined itself to matters thought to be fundamental, and left to the General Assembly the wide and fruitful field of legislation. In weighing the merits of the Constitution now offered, these considerations should be borne in mind.

In order that the voters may intelligently answer the one question which must be answered by their ballots: "Does the proposed new Constitution, on the whole and in view of the needs of all of the people of the whole State, promise better governmental conditions than the present Constitution?" we who have worked these many months to improve our government, here set forth in brief the principal changes which will be effected and our reasons for believing that they are desirable.

. . . . .

### CONCLUSION

The highest and noblest political activity of a self-governing people is the adoption of a Constitution. History affords no nobler conception of government than that which contemplates self-respecting and intelligent human beings deliberately considering and voluntarily adopting rules which shall be binding upon themselves, and to which they shall first owe obedience.

The people of Illinois are now called upon for the first time in fifty-two years to enter upon this serious undertaking. The delegates to the Convention have constituted but a committee to consider the changes that may to them seem desirable, and to recommend such changes to the ultimate sovereign, the people. With the people must rest the responsibility. We, of the Convention, have spent many months of patient labor upon this work. By the committees to which were first referred the proposals all citizens who desired to be heard were given opportunity to express their views. Infinite pains have been taken to ascertain the sentiments of the people of the State and like pains have been taken to express these sentiments in formal rules of law.

To our fellow citizens of the State of Illinois, by whom we were selected to perform the important task of formulating a Constitution, and to whom we have never failed to recognize our responsibility, we now submit the results of our labor, confident that the people in their wisdom will duly weigh the advantages of the offered Constitution as compared with that under which we now live and will by their ballots render a just and wise decision.

On December 12, 1922, the election will be held to determine whether our judgment of the welfare of the State shall be approved. On that date every man and woman who loves his or her State should glory to discharge the highest political duty of free men and free women and register their opinions at the polls.

Done in convention at the capitol in the city of Springfield on the twelfth day of September in the year of our Lord one thousand nine hundred twenty-two.

In witness whereof we have hereunto subscribed our names.

CHARLES E. WOODWARD  
President

Attest:

B. H. McCANN  
Secretary

#### 114. THE CONSTITUTIONAL CONVENTION OF MASSACHUSETTS

One of the most important deliberative bodies which has met in recent years for the purpose of revising the fundamental law of a state was the Massachusetts constitutional convention of 1917-19. A good account of the work of that body follows.

[Lawrence B. Evans, "The Constitutional Convention of Massachusetts," *American Political Science Review*, Vol. XV, pp. 214-232 (May, 1921).]

The constitutional convention of Massachusetts which assembled in the city of Boston, June 6, 1917, and finally terminated its labors at a short session of two days in August, 1919, is the fourth body of this kind which the Old Bay State has had. The first convention was held in 1779 and 1780 in Cambridge and Boston, and formulated the constitution of 1780. This instrument, to which sixty-six amendments have been added, is the oldest written constitution now in force anywhere in the world. The second convention was held in 1820, and submitted a series of resolutions part of which were adopted and part rejected by the people. A third convention met in 1853 all of whose proposals were rejected. After an interval of sixty-four years, a fourth convention was called, which met in 1917 and again in 1918 and yet again in 1919. It submitted to the people twenty-two amendments and a revised draft of the constitution, all of which were accepted.

The convention was composed of 320 delegates. Of these 16 were elected at large, 4 were elected by each congressional district, and the remaining 240 were elected from the districts created for the purpose of choosing members of the state house of representatives. They were elected without party designations, but before the election took place, the lines between the friends and the opponents of the initiative and referendum were rather sharply drawn, and this served practically all the purposes of party organization and designation. In fact, this question dominated the whole of the first session of the convention and overshadowed other questions which were probably of greater importance.

Three months before the convention assembled, the governor appointed a "Commission to compile Information and Data for the Use of the Constitutional Convention," to which were assigned offices in the state house, which were kept open throughout the first two sessions of the convention and where at least one member of the commission could always be found. In considering how it could be of most use to the convention, the commission reasoned that as the convention was made up of busy men who had neither the time nor in many cases the necessary training for undertaking extensive research, it would be most helpful to issue a series of bulletins, each dealing with a topic which was likely to come before the convention. To this end a circular letter was sent to all the men, about nine hundred in number, who had taken out nomination papers for election to the convention, asking them on what topics they would suggest that information be compiled.

About one hundred different topics were mentioned, and on thirty-six of these, bulletins were prepared, of which an edition of five hundred copies was printed and a copy sent to each delegate as soon as issued. In order to achieve the largest usefulness, all of these bulletins should have been in the hands of the delegates before the convention assembled. The commission was appointed too late to make this possible, and the best that it could do was to see that each bulletin was ready before the subject with which it dealt was reported upon by a committee of the convention.

In preparing its bulletins the commission sought to give them three characteristics. They must be concise, else they would not be read; they must be authoritative, so that the delegates could accept their statements of fact as established and safely base conclusions upon them; they must be impartial and free from attempts at propaganda. When this series of bulletins began to appear, few of the delegates paid much attention to them, but this attitude gradually changed, and upon at least one occasion the convention postponed its debate upon a certain topic until it had received the commission's bulletin which was then nearing completion.

The commission not only compiled information for the convention, but it was made an integral part of the convention's machinery. Its members frequently appeared before committees, it assisted the delegates in the drafting of amendments, and its vice-chairman was made an officer of the convention and served throughout as technical adviser to committees. The most important function of this office was to assist the committee on form and phraseology in the final revision of proposed amendments before they were sent to the people.

The convention was called to order by Governor McCall. This was peculiarly fitting, for he more than any other man is entitled to the credit for the enactment of the legislation which resulted in the holding of the convention. The delegates chose for their president Hon. John L. Bates, former governor of Massachusetts, and much of the success of the convention was due to his great ability as a presiding officer, to his fairness, and to the skill with which he helped the convention over many hard places.

The first session of the convention, which occupied the summer of 1917, was dominated by the question which had been uppermost in the public mind since the holding of a convention was first proposed, namely, whether Massachusetts should adopt some form of initiative and referendum. A measure covering the sub-

ject was introduced and held the center of the stage throughout the session of 1917, but was put aside from time to time to permit the consideration of other questions which it was deemed necessary to submit to the people at the November election. Three such measures were agreed upon by the convention and adopted by the people in November, 1917. Each of the fourteen counties returned a majority in favor of each amendment. . . .

When these three amendments had been submitted to the people, the convention resumed its discussion of the initiative and referendum, and finally adopted a measure which provides for the initiation by the people of both constitutional amendments and of laws and also for a compulsory referendum on enactments of the legislature. The measure is too long for detailed description, but its distinguishing feature as compared with similar measures in other states may be said to be its exemptions. Neither the judiciary, nor judicial decisions, nor the anti-aid amendment, nor any of the great safeguards of liberty set forth in the bill of rights may be made the subject of an initiative petition. Having adopted this amendment by a vote of 163 to 125, and having provided that it should be submitted to the people at the state election of November, 1918, the convention adjourned until June, 1918.

When the convention reassembled, it should have felt stimulated by the endorsement implied in the overwhelming majorities by which the three amendments submitted had been ratified. The result however was otherwise. Although some of the questions discussed at the second session were not inferior in importance to those of the first session, it was noticeable that the interest of many of the delegates had materially flagged, and a considerable number paid little attention to the proceedings. Eighteen amendments were, however, approved by the convention, and at the election in November, 1918, they, as well as the amendment establishing the initiative and referendum—adopted too late for action in 1917—were ratified by the people. . . .

As already stated, the Massachusetts constitution of 1780 is the oldest written constitution now in force anywhere in the world. To keep it abreast with the needs of the state and with changing sentiment, sixty-six amendments have been adopted. As a result, it is often difficult to determine with precision what the requirements of the constitution are as to any given point. Hence, before adjournment on August 21, 1918, the convention provided for the appointment of a committee to prepare a revised draft of the constitution, striking out all obsolete matter,



and inserting in the proper place each provision that was still in force. The chairman of the subcommittee which had active charge of this work was Hon. James M. Morton, retired justice of the supreme judicial court, whose wide experience and great learning and beneficent presence contributed so much to the work of the convention. Judge Morton prepared a revision (the Morton draft), the writer also prepared one (the Evans draft), and upon these two the committee formed a third draft, which was accepted by the convention at a short session in August, 1919, and was ratified by the people at the November election by a majority of more than 200,000. Unfortunately, in an effort to make sure that the revision had not altered the original sense of any provision of the constitution, some one obtained the insertion of the following ill considered section:

“Art. 156. Upon the ratification and adoption by the people of this rearrangement of the existing constitution and the amendments thereto, the constitution shall be deemed and taken to be so rearranged and shall appear in such rearranged form in all future publications thereof. Such rearrangement shall not be deemed or taken to change the meaning or effect of any part of the constitution or its amendments as theretofore existing or operative.”

When the supreme judicial court was asked to determine whether the new draft was now the constitution of the state or whether the old instrument with its sixty-six amendments was still in force, the court held that the paragraph above quoted indicated that the new draft was not intended to supplant the old constitution, which therefore still remained the fundamental law. At the ensuing session of the legislature Senator Loring, who had been chairman of the committee on form and phraseology of the convention, endeavored to persuade that body to submit the new draft, with the obnoxious article omitted, as a constitutional amendment, but the motion was rejected almost unanimously.

In order to form a just estimate of the work of the constitutional convention it is necessary to look not only at the measures which it adopted but also at those which it refused to adopt. It is impossible of course to enumerate all the constitutional provisions which it might have submitted to the people for their approval. These cover the whole range of government. Neither would it be profitable to consider the proposals, several hundred in number, which were unfavorably reported by committees and were never considered by the convention. But of the proposals

for amendment which were before the convention and were extensively debated and finally rejected, three are of special importance, and as to these three, students of politics and government are practically unanimous in disagreeing with the judgment of the convention.

The first of these proposals authorized the legislature to classify property for purposes of taxation. The constitution of Massachusetts restricts the taxing power of the legislature, except as to taxes on incomes, to the levying of "proportional and reasonable" taxes. The supreme court has held repeatedly that the word "proportional" prevents the taxing of different kinds of property at different rates. All property must be taxed alike in proportion to its value. This rule may have been just and expedient in 1780, when the forms of property were less numerous and the economic organization of society less complex than at present, but it is contrary to the opinion which now prevails as to the proper basis of a sound system of taxation. Massachusetts particularly requires the elasticity which the levying of taxes by classes permits, for there is no part of the country where property has been accumulated in forms more easily evasive of the tax gatherer or where economic interests are more intricate. Yet the convention refused to alter the ancient rule. If the gossip of the corridors can be relied upon, certain real estate interests in Boston were chiefly responsible for the defeat of the amendment.

On the subject of social insurance the convention again failed to act in accordance with prevailing opinion. Whatever one may think of the merits of old age pensions, health insurance, accident insurance and other forms of social amelioration, particularly as applied to the needs of his own community, there is general agreement that every state legislature ought to be vested with the power to enact legislation of this kind. Whether the power ought to be exercised is another question. Several amendments were drafted for the committee on social welfare, all of which were reported to the convention. Among these the convention chose for discussion the most comprehensive one, one which authorized the legislature to enact practically any form of social insurance which met with its approval. As this proposal was supported by those members of the committee who were regarded as ultra conservative, an easy victory in the convention was predicted. But it was defeated, and strange to say, largely through the opposition of the labor delegates. It has been suggested that the amendment was unnecessary, inasmuch as the

residuary power of the legislature is probably broad enough to cover legislation of this kind. This opinion is probably correct, but in the case of a matter of such extreme importance all doubt should be removed. Should Massachusetts adopt a system of old age pensions, for instance, the constitutionality of the legislation would undoubtedly be disputed, and the matter would be judicially tested. It is unfair to the courts to place upon them the burden of deciding, on purely legal considerations, a question which the people ought to decide for themselves. Much of the criticism of the courts for decisions in cases involving the validity of social legislation would be avoided if the people would remove from their constitutions the ambiguities which make judicial action necessary.

The third amendment which the convention rejected, but which all students of government will agree should have been adopted, made definite provision for the calling of a constitutional convention. The constitution of 1780 provided that in 1795 the question should be submitted to the people as to whether a convention should be held. If they should decide in the negative, as they did, no further provision was made for resubmitting the question or for calling a convention in any other way. The convention of 1820 provided a method for amending the constitution through proposals initiated by the legislature, and it has been argued by some that the specific enumeration of this method excludes all others. A like situation exists in Rhode Island, and its supreme court has ruled in an advisory opinion that a constitutional convention cannot be held in that state. The supreme judicial court of Massachusetts has said, in an advisory opinion written by Chief Justice Shaw, that amendment on the initiative of the legislature is the only method of amendment authorized by the constitution of Massachusetts. Just what the court meant by this cryptic utterance is uncertain. If it meant that amendment through legislative action is the only method mentioned in the constitution, it stated an obvious fact. But if it meant that the mention of this method of amendment was sufficient in itself to remove from the residuary power of the legislature the authority to provide for a constitutional convention, many would dissent. Those who would apply in this situation the maxim *expressio unius exclusio alterius* fail to take into account the high nature of the residuary power of the legislature. It represents the whole political authority of the people. Subject only to the limitations of the federal and state constitutions, the power of the legislature embraces the whole range of political

action. It is not to be presumed that it has been cut down unless the intention of the people is unmistakable. When the people of Massachusetts gave the legislature the power to initiate amendments, it did not take from it the power to adopt any other method of constitutional revision which it had previously had the power to adopt. Both reason and constitutional practice in Massachusetts, clearly establish the power of the legislature to submit to the people the question of calling a convention. But the discussion of the subject establishes with equal clearness the wisdom of removing all doubt. Yet a resolution giving the legislature power to submit to a popular vote the question of calling a convention was rejected. The explanation is not clear. The resolution was acted upon late in the second session. The delegates were tired and it was difficult to attract their attention. The debate, particularly on the part of the opposition, was weak. The resolution was defeated perhaps as much by inertia as anything else, assisted by a feeling that the convention had already done enough.

Not the least interesting feature of the constitutional convention and its work is the action of the people upon the amendments submitted. At the election of 1917, three amendments were submitted, and the action of the people on them showed the popular referendum in its very best light. All of these amendments were adopted by substantial majorities. Furthermore each of them received a majority of votes in each county in the state, and in no instance was the number of blank ballots as large as the number of ballots in favor of the amendment. Still more impressive was the fact that the total vote for and against each of these amendments was about 85 per cent of the total vote cast for the various candidates for governor. . . .

There was one undesirable practice on the part of some of the delegates to the convention which should be mentioned in order that future conventions both in Massachusetts and elsewhere may prevent it. That is the abuse by delegates of the privilege of revising the stenographic report of the speeches which they addressed to the convention. When the question of printing the debates was under discussion in the convention, it was pointed out that these debates would not only have value in the future as discussions of the subjects with which they dealt, but also that they would throw light upon the meaning of doubtful clauses in the constitution, and hence would be consulted not only by students of public affairs but by legislators and by the courts. It is obvious however that the printed de-

bates lose their value as guide to the meaning of the constitution if they are not a true record of what was said in the convention. We are all familiar with the scandalous length to which Congress has gone in granting leave to print and the privilege of extending remarks. It is believed that the constitutional convention never granted to any delegate formal leave to print, but the same result was attained through the privilege accorded to each delegate of revising the stenographer's report of his speech. In at least one instance, one of the most prominent members of the convention revised his speech by substituting for it an entirely new one. The speech in the printed report was never delivered to the convention, and as the debates were not printed until after the adjournment of the convention, there was no opportunity for the delegates to detect this falsification of the record. Obviously such a speech is of no value as a guide to the meaning of the provision under discussion, for since it was never delivered, its assertions could not be corrected nor its arguments refuted.

The constitutional convention of Massachusetts furnishes strong evidence of the change which has come over the view taken by the people of the functions of government. Whether their conclusion be a wise one or not, it is unquestionably true that the people of our day have rejected Jefferson's maxim that that government is best which governs least. Public opinion requires that the field of governmental activity shall be enlarged, and that our political machinery, whose function a century ago seemed to be chiefly a protective and defensive one, shall now become the active agent for the conduct of enterprises which were formerly under private control. The wider the range of government becomes, the more necessary it is that its agents shall have large freedom of action. The carefully devised series of checks and balances to which John Adams paid eloquent tribute may easily result in deadlock. In accordance with the prevailing opinion of the time, most of the amendments submitted to the people of Massachusetts in 1917 and 1918 enlarged the sphere of the government and removed existing restrictions, while only a few of them imposed new restrictions. In this respect the convention of 1917-18 is in marked contrast with the earlier conventions in Massachusetts. The convention of 1820 submitted fourteen amendments to the people, only one of which involved any increase in the power of the legislature, while the convention of 1853 recommended no increase at all in the power of the legislature. Abuse of official authority is no longer the bugbear which

it was to our grandfathers, or at any rate the people of our day are willing to incur the risk of such abuse in order to leave to their government freedom to act.

While the Massachusetts convention showed the prevailing opinion as to enlarging the sphere of government and removing restrictions on the action of governmental agents, it was essentially a conservative body. None of its recommendations was radical. It adopted the popular initiative and referendum, but surrounded it with many safeguards. It refused to make any substantial change in the judiciary. The substitution of biennial for annual elections was essentially a conservative measure. In fact, it may be said of all of the twenty-two amendments which it submitted to the people that they made only such changes as are to be expected in any enlightened and progressive community which endeavors to adapt itself to the demands of new conditions and to keep in touch with the expanding range of men's thoughts.

## CHAPTER XVIII

### SUFFRAGE, PARTIES, AND ELECTIONS

#### 115. SUFFRAGE QUALIFICATIONS

The power of each state to determine suffrage qualifications for itself is obvious, provided only that the state conforms to the limitations prescribed in the United States Constitution. Hence it follows that these qualifications may vary from time to time and from state to state. During the early history of this country the qualifications were very severe, religious and especially property tests being commonly imposed. As a part of the so-called "democratic wave," these restrictions were generally abandoned and the franchise was widely extended. Of recent years, the tendency has been again to impose more restrictions, but now chiefly in the form of an educational or literary test.

##### a. Early Suffrage Provisions in Connecticut

[Connecticut Constitution of 1818, Art. VI; in Thorpe, *American Charters, Constitutions, and Organic Laws*, vol. I, p. 544.]

SECTION 1. All persons who have been, or shall hereafter, previous to the ratification of this Constitution, be admitted freemen, according to the existing laws of this State, shall be electors.

SEC. 2. Every white male citizen of the United States, who shall have gained a settlement in this State, attained the age of twenty-one years, and resided in the town in which he may offer himself to be admitted to the privilege of an elector, at least six months preceding; and have a freehold estate of the yearly value of seven dollars in this State; or, having been enrolled in the militia, shall have performed military duty therein for the term of one year next preceding the time he shall offer himself for admission, or being liable thereto shall have been, by authority of law, excused therefrom; or shall have paid a State tax within the year next preceding the time he shall present himself, for such admission; and shall sustain a good moral character, shall, on his taking such oath as may be prescribed by law, be an elector.

SEC. 3. The privileges of an elector shall be forfeited by a conviction of bribery, forgery, perjury, duelling, fraudulent

bankruptcy, theft, or other offense for which an infamous punishment is inflicted.

### b. Suffrage Provisions in Illinois

[*Illinois Election Laws in force July 1, 1921*, pp. 44-46.]

## ARTICLE IX

### QUALIFICATION OF VOTERS

1. . . . Every person having resided in this State one year, in the county 90 days, and in the election district 30 days next preceding any election therein, who was an elector in this State on the first day of April, in the year of our Lord 1848, or obtained a certificate of naturalization before any court of record in the State prior to the first day of January, in the year of our Lord 1870, or who shall be a male citizen of the United States, above the age of 21 years, shall be entitled to vote at such election.

2. . . . A permanent abode is necessary to constitute a residence within the meaning of the preceding section.

3. . . . No pauper or inmate of any county poor house, insane asylum or hospital in this State, shall by virtue of his abode at such county poor house, insane asylum or hospital be deemed a resident or legal voter in the town, city, village or election district or precinct in which such poor house, insane asylum or hospital may be situated; but every such person shall be deemed a resident of the town, city, village, or election district or precinct in which he resided next prior to becoming an inmate of such county poor house, insane asylum or hospital.

4. . . . Every honorably discharged soldier or sailor who shall have been an inmate of any Soldiers' and Sailors' Home within the State of Illinois for 90 days or longer, and who shall have been a citizen of the United States and resided in this State one year, in the county where any such home is located 90 days, and in the election district 30 days next preceding any election, shall be entitled to vote in the election district in which any such Soldiers' and Sailors' Home in which he is an inmate thereof as aforesaid is located, for all officers that now are or hereafter may be elected by the people, and upon all questions that may be submitted to the vote of the people: *Provided*, that he shall declare upon oath, if required so to do by any officer of election in said



district, that it was his *bona fide* intention at the time he entered said home to become a resident thereof.

8. . . . No person who has been legally convicted of any crime, the punishment of which is confinement in the penitentiary, or who shall be convicted and sentenced under section 1 of Article XII of this Act, shall be permitted to vote at any election unless he shall be restored to the right to vote by pardon; or by the expiration of the term of his disfranchisement under section 7 of Article XIII of this Act.

9. . . . That all women, citizens of the United States, being of the age of twenty-one years and upward, having resided in the State one year, in the county ninety days, and in the election district thirty days next preceding any election therein, shall be entitled to vote at such election; and shall not be denied the right to vote at any and all elections by reason of sex; *Provided*, at any such election for which registration is required by any provision of law, women shall register in the same manner as male voters: *Provided, further*, that it shall not be necessary at any election to provide separate ballots or ballot boxes for women.

### c. The New York Literacy Test

[F. G. Crawford, in *American Political Science Review*, vol. XVII, pp. 260-263 (May, 1923).]

There has been of late years a growing demand for constitutional provisions and legislative enactments that will provide for a more intelligent ballot. Although isolated attempts to solve this problem appear before 1890, it was not until that date that the commonwealths of the United States made any progress in literacy tests for voting. Twenty states now have some form of literacy test, provided for by their constitution or by legislative enactment, or have left the legislature free to act if that body so chooses.

Connecticut passed the first reading test in 1855 and Massachusetts the first reading and writing test in 1856. Colorado followed in 1876, the constitution of that year providing that the legislature should establish by law an educational test as a qualification for voting, which was not to go into effect until 1890 and would not disqualify any then qualified voters. The provision was of no importance, for the legislature of that state has never acted under the power granted.

The educational qualification was not important until 1890 when four states inserted provisions in their new constitutions, the real purpose being to limit the negro vote. The following states now have as a part of their constitution or by law some provision for a literacy or educational test: Alabama, Arizona, California, Connecticut, Delaware, Georgia, Idaho, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, North Carolina, North Dakota, Oklahoma, South Carolina, Texas, Virginia, Wyoming, and Washington.

The provisions differ in detail in each state but certain groups have general principles in common. The following states provide that persons shall be qualified to vote if they can read or write any article of the state constitution: Alabama, Georgia, North Carolina, Oklahoma, and South Carolina; while the states of California, Connecticut, Delaware, Maine, Massachusetts, New Hampshire, and Wyoming provide for voting if the voter can read the constitution and write his own name. Arizona grants the suffrage to those who can read the constitution in the English language in such a way as to show that they are neither prompted nor reciting from memory. In Texas the voter must explain in the English language how he wishes to vote. Mississippi, Louisiana, and Virginia call for a satisfactory reading or understanding of the constitution and thus maintain the loop-hole through which election boards may exclude negro voters. The state of Washington grants the privilege to those who can read and speak the English language. The constitutions of Idaho and North Dakota grant their legislatures authority to make educational qualifications but no action has been taken under this provision.

At the general election of 1921, an amendment to the New York constitution was passed changing Article II, Section 1, which now states "After January 1, 1922 no person shall become entitled to vote . . . unless such person is also able, except for physical disability, to read and write English; and suitable laws shall be passed by the Legislature to enforce this provision."

The legislature of 1922 provided two methods to test the literacy of new voters, tests by election boards and the certificate of literacy. For the first method, there were prepared by the secretary of state one hundred extracts of fifty words each from the constitution of the state for reading, and from these fifty words are to be selected ten words to be written. These tests are to be given by election boards on registration day in communities of five thousand or over, and on election day for those under five thousand where personal registration is not required.

New York is original in that it has created through its board of regents a certificate of literacy to be given to voters after an examination has been taken. The committee of the regents decided to set the test at the requirement of the fourth year. This decision is tentative and the difficulty will increase gradually. The whole plan in the regents test is to read and write intelligently. The writing on the regents test is to determine the voter's ability to convey meaning in writing and is a reading-writing examination rather than a reading and writing test.

A sample selection with questions follows: "A vote is the expression of one's will as to men seeking office or bills proposed for the good of the people. A vote may be taken in three ways, by voice, by show of hands, or by slips of paper. In political matters, the ballot is generally used. There is a sheet of paper on which the name of the candidate for office is printed. The voter puts a mark opposite the name of the man he thinks ought to be chosen for office. He must be careful to mark the ballot properly. Ballots not properly marked are not counted."

1. What is the expression of one's will as to men seeking office called?

2. For whose good are bills said to be proposed?

3. In how many ways may a vote be taken?

4. Name one way in which a vote may be taken.

5. What is the sheet of paper used in balloting called?

6. What does the voter put opposite the name of the man he wishes to vote for?

7. What is printed on the ballot?

8. What happens if the ballots are not properly marked?

Instructions are read to the candidate at the time of taking the test from the pamphlet of instructions as follows: "This is a test to see whether you can read and write English. On the other side of this sheet there is a selection for you to read. Under the selection there are some questions for you to answer. First, read the selection. Next read the first question. Then go back and read the selection until you find the answer to the first question. Usually the answer will be only one or two words. When you have found the correct answer, write it on the dotted line after the first question. You need not answer in a complete sentence. Write answer as plainly as you can for this is a test of both reading and writing. Answer all the other questions in the same way. When you have answered every question, read the selection over again and make sure you have no mistakes. If you have any questions, ask them now."

A certificate of literacy may be issued to all applicants who show that they have completed the fifth grade in the public schools of the state, or to those who have completed work equivalent to the fifth grade in evening, private, or parochial schools of the state, as well as to those who successfully pass the examination described above. The law provides that opportunity shall be given to secure the literacy certificates in the two weeks preceding registration. School officials are in charge.

The experiment is a novel one in its attempt definitely to connect up the school authorities with the qualifications for voting. The Americanization movement in New York state has furnished aliens the opportunity to learn English when applying for citizenship and an equal chance to comply with the state educational qualification for voting.

## 116. AUSTRALIAN BALLOT SYSTEM

Until the middle of the nineteenth century, there were practically no statutory regulations of any value with respect to the conduct of elections. The sort of regulation that existed is pretty well typified by the Massachusetts Colonial Law of 1647, which required votes to be cast "by wrighting the names of the persons Elected, in papers open or once foulded, not twisted or rowled up, that they may be the sooner perused." Fraud and corruption had therefore become rampant, and the need for reform was obvious. In 1857, the secret ballot was provided for elections to the Legislative Council of South Australia, and shortly thereafter was extended to all elections and adopted by the other provinces of Australia. From Australia the movement spread throughout the world, the system being introduced into England in 1872, into Canada in 1873, and into the continent of Europe in 1877. It was finally introduced into the United States in 1888, when adopted in Kentucky for municipal elections (the Kentucky constitution requiring viva voce voting for state elections), and in Massachusetts for both state and municipal elections. The principles of the so-called Australian ballot system are now generally accepted as axiomatic, although it may be pointed out that one state (Georgia) did not adopt this system until 1922. The pertinent provisions of a typical Australian ballot law are given below.

[Illinois Ballot Act of 1891. *Laws of Illinois, 1891*, pp. 107-121.]

AN ACT to provide for the printing and distribution of ballots at public expense, and for the nomination of candidates for public offices, to regulate the manner of holding elections, and to enforce the secrecy of the ballot.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That in all elections hereafter to be held in this State for public officers, except for

trustees of schools, school directors, members of boards of education, officers of road districts in counties not under township organization, the voting shall be by ballots printed and distributed at public expense as hereinafter provided, and no other ballots shall be used.

§ 2. The printing and delivery of the ballots and cards of instruction to voters hereinafter described, shall, in municipal elections in cities, villages and incorporated towns, be paid for by the several cities, villages and incorporated towns respectively, and in town elections by the town, and in all other elections the printing of the ballots and cards of instruction for the voters in each county and the delivery of them to the several voting precincts and election districts shall be paid for by the several counties respectively. The term "general election" as used in this act, shall apply to any election held for the choice of a national, State, judicial, district or county officer, whether for the full term or for the filling of a vacancy. The term "city election" shall apply to any municipal election held in a city, village, or incorporated town.

. . . . .

§ 14. The names of all candidates to be voted for in each election district or precinct shall be printed on one ballot; all nominations of any political party or group of petitioners being placed under the party appellation or title of such party or group as designated by them in their certificates of nomination or petitions, or if none be designated, then under some suitable title, and the ballot shall contain no other names, except, that in case of electors for President and Vice-President of the United States, the names of the candidates for President and Vice-President may be added to the party or political designation. If a constitutional amendment or other public measure is submitted to a vote, such question shall be printed upon the ballot after the list of candidates, and words calculated to aid the voter in his choice of candidates or to answer any question submitted to vote, may be added, such as: "Vote for one," "Vote for three," "Yes," "No," or the like. On the back or outside of the ballot, so as to appear when folded, shall be printed the words, "Official ballot," followed by the designation of the polling place for which the ballot is prepared, the date of the election and a *fac simile* of the signature of the clerk or other officer who has caused the ballots to be printed. The ballots shall be of plain white paper, through which the printing or writing cannot be read. The party appellation or title shall be printed in

capital letters, not less than one-fourth of an inch in height and a circle one-half inch in diameter shall be printed at the beginning of the line in which such appellation or title is printed. The names of candidates shall be printed in capital letters not less than one-eighth nor more than one-fourth of an inch in height, and at the beginning of each line in which a name of a candidate is printed a square shall be printed, the sides of which shall not be less than one-fourth of an inch in length. The list of candidates of the several parties and groups of petitioners shall be placed in separate columns on the ballot in such order as the authorities charged with the printing of the ballots shall decide.

...

§ 15. For all elections to which this act applies, the county clerks, in their respective counties, shall have charge of the printing of the ballots for all general elections, and shall furnish them to the judges of election; the city, town or village clerk shall have charge thereof and furnish them in all city elections, and the town clerk in counties under township organization shall have charge thereof and furnish the same in all town elections to which this act applies: *Provided*, that in cities, towns or villages having a board of election commissioners, such board shall have charge of the printing of the ballots and furnish them to the judges of election within the territory under their jurisdiction. . . .

§ 21. All officers upon whom is imposed by law the duty of designing or providing polling places shall provide in each polling place so designated or provided a sufficient number of booths, which shall be provided with such supplies and conveniences, including shelves, pens, penholders, ink, blotters and pencils, as will enable the voter to prepare his ballot for voting, and in which voters may prepare their ballots, screened from all observation as to the manner in which they do so; and a guard rail shall be so constructed and placed that only such persons as are inside said rail can approach within six feet of the ballot box and of such voting booths. The arrangements shall be such that the voting booths can only be reached by passing within said guard rail. They shall be within plain view of the election officers, and both they and the ballot boxes shall be within plain view of those outside the guard rail. Each of said booths shall have three sides enclosed, one side in front, to open and shut by a door swinging outward, or to be closed with a curtain. Each side of each booth shall be seven feet high, and the door or curtain shall extend to within two feet of the floor, which shall be

closed while the voter is preparing his ballot; and such booths shall be well lighted. Each booth shall be at least three feet square, and shall contain a shelf at least one foot wide, at a convenient height for writing. No person other than the election officers and the challengers allowed by law, and those admitted for the purpose of voting as hereinafter provided, shall be permitted within the guard rail, except by authority of the election officers to keep order and enforce the law. The number of such voting booths shall not be less than one to every one hundred voters who voted at the last preceding election in the district. The expense of providing booths and guard rails and other things required in this act shall be paid in the same manner as other election expenses.

§ 22. Any person desiring to vote shall give his name and, if required to do so, his residence, to the judges of election, one of whom shall thereupon announce the same in a loud and distinct tone of voice, clear and audible; and if such name is found on the register of voters by the officer having charge thereof, he shall likewise repeat said name and the voter shall be allowed to enter the space enclosed by the guard rail, as above provided. One of the judges shall give the voter one, and only one, ballot, on the back of which such judge shall endorse his initials in such manner that they may be seen when the ballot is properly folded, and the voter's name shall be immediately checked on the register list. At all elections, when a registry may be required, if the name of any person so desiring to vote at such election is not found on the register of voters, he shall not receive a ballot until he shall have complied with the law prescribing the manner and conditions of voting by unregistered voters. If any person desiring to vote at any election shall be challenged, he shall not receive a ballot until he shall have established his right to vote in the manner provided by law. Besides the election officer not more than two voters in excess of the whole number of voting booths provided shall be allowed in said inclosed space at one time.

§ 23. On receipt of his ballot the voter shall forthwith, and without leaving the inclosed space, retire alone to one of the voting booths so provided and shall prepare his ballot by making in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled, or by writing in the name of the candidate of his choice in a blank space on said ticket, making a cross (X) opposite thereto; and in case of a question submitted to the vote of the people, by making in the

appropriate margin or place a cross (X) against the answer he desires to give: *Provided, however*, if he shall desire to vote for all of the candidates of one political party or group of petitioners, he may place such mark at the appropriate place preceding the appellation or title under which the names of the candidates of such party or group of petitioners are printed, and the ballot so marked shall be counted as cast for all of the candidates named under that title: *Provided, further*, that the voter may place such mark at the appropriate place preceding the appellation or title of one party or group of petitioners and may also mark, at the appropriate place preceding the name or names of one or more candidates printed under the appellation or title of some other party or group of petitioners, and a ballot so marked shall be counted as cast for all the candidates named under the appellation or title which has been so marked, except as to the officers as to which he has placed such mark preceding the name or names of some other candidate or candidates printed under the title of some other party or group of petitioners, and as to such it shall be counted as cast for the candidate or candidates preceding whose name or names such mark may have been placed. Before leaving the voting booth the voter shall fold his ballot in such manner as to conceal the marks thereon. He shall then vote forthwith in the manner now provided by law, except that the number corresponding to the number of the voter on the poll books shall not be indorsed on the back of his ballot. He shall mark and deposit his ballot without undue delay, and shall quit said inclosed space as soon as he has voted. No voter shall be allowed to occupy a voting booth already occupied by another, nor to remain within said inclosed space more than ten minutes, nor to occupy a voting booth more than five minutes in case all of said voting booths are in use and other voters waiting to occupy the same. No voter, not an election officer, shall, after having voted, be allowed to re-enter said inclosed space during said election. No person shall take or remove any ballot from the polling place before the close of the poll. No voter shall vote, or offer to vote, any ballot except such as he has received from the judges of election in charge of the ballots. Any voter who shall, by accident or mistake, spoil his ballot, may, on returning said spoiled ballot, receive another in place thereof.

§ 24. Any voter who may declare upon oath that he cannot read the English language, or that by reason of any physical disability he is unable to mark his ballot shall, upon request, be assisted in marking his ballot by two of the election officers



of different political parties, to be selected from the judges and clerks of the precinct in which they are to act, to be designated by the judges of election of each precinct at the opening of the polls. Such officers shall mark the ballot as directed by the voter, and shall thereafter give no information regarding the same. The clerks of election shall enter upon the poll lists after the name of any elector who received such assistance in marking his ballot a memorandum of the fact. Intoxication shall not be regarded as a physical disability, and no intoxicated person shall be entitled to assistance in marking his ballot.

Approved June 22, 1891.

### 117. TYPES OF ELECTION BALLOTS

The Australian ballot, as described in the previous selection, has taken various forms in the United States, and is everywhere a modification of the original Australian system in its adaptation to our system of political parties. The most common form is that adopted in Indiana in 1889, and therefore called the Indiana or "party-column" type; while its antithesis is the form adopted in Massachusetts, and called the Massachusetts or "office-column" type. Each of these types has been in turn adopted with modifications by other states, those of Illinois and New York being fairly representative. (See samples of Illinois and New York ballots on facing page.)

### 118. VOTING MACHINE

A fairly recent development in election methods is the tendency to substitute voting machines for paper ballots, although in isolated sections such machines have been used for more than 25 years. They are now (1928) authorized in nineteen states,<sup>1</sup> and are being used in nine or ten. Their most widespread use is in New York, where they were introduced into certain up-state cities more than 25 years ago, and in 1925 into New York City, although only after bitter opposition. By 1927 there were only three cities and four first-class villages in the state of New York that were not using these machines, so that it may be possible to make some estimate of the value of such devices.

a. Diagram of Voting Machine in New York. (See facing page)

b. Operation of the Voting Machine in New York City

[T. David Zukerman, in *American Political Science Review*, vol. XXI, pp. 603-606 (Aug., 1927).]

The most important development in the history of the voting machine during the past three years has been the successful con-

<sup>1</sup> New York, Arkansas, Arizona, Connecticut, Washington, Indiana, Iowa, Michigan, Wisconsin, Montana, Minnesota, California, Illinois, Massachusetts, Maine, New Hampshire, Virginia, Oregon, Maryland.

summation of the efforts to compel its use in New York City. In spite of ingenious legal tactics to prevent their acceptance, enough machines were used in the elections of 1925 and 1926 to furnish a thoroughgoing demonstration of their possibilities. Their success was so evident that all outspoken opposition to extension of the machines throughout the city has practically disappeared. The two largest boroughs, containing two-thirds of the voting population, will be entirely equipped in time for the elections this fall. The remaining boroughs will be equipped as rapidly as the manufacturers can supply the required machines. The voting machine has ceased to be an issue in New York City. The case has been definitely won. . . .

The comment which appeared after the use of the machines in the election was decidedly favorable. The advantages proved precisely as had been predicted and won the support of some who had formerly been opposed. The Democratic chairman of the board of elections, a nonagenarian, repeated his former objections—that there was no assurance to the voter that his vote was effective as he intended, which, of course, is at least equally true in the case of paper ballots. Two other objections raised were that the Socialist levers, being below the Republican names, might be used in error instead of the levers for Republicans, and that there were thirty-two knobs for constitutional amendments, of which there were only four to be voted on. The former objection was answered by an examination of the results, which showed no undue number of Socialist votes. The latter could easily be eliminated by covering or removing the superfluous knobs. Except for these objections, there was nothing but praise. . . .

The experience in 1926 was highly satisfactory. None of the difficulties forecast were in evidence except in isolated cases, where they were easily remedied. Comment was favorable, even enthusiastic. Editorials, even in papers that had previously regarded the machines somewhat coolly, expressed approval. It must be said that their use appeared to make little difference in the election results. The Republicans, who had been their staunch advocates, found that they gave no favors to their party; and the Democrats found nothing adverse. There was no revolution in voting habits, but there was a decided satisfaction with the ease and efficiency of the voting machine method.

Economies from the use of voting machines are already appearing. The city budget for 1927 shows that a reduction in the pay for the four election inspectors in each of the 616 districts already equipped from \$15 to \$10 on election day, and the elimina-

tion of the clerks, both called for by law, have reduced the appropriation necessary for salaries by about \$20,000. The cost of supplies was \$115,000 less than in 1924. Plans have been announced for reducing the number of districts in the boroughs where equipment is to be completed, to take advantage of the provision allowing 600-700 voters where one machine is used as against 450-600 with paper ballots. In 1926, districts in Manhattan averaged less than 400 and those in Brooklyn about 440. It was planned to reduce the number in these two boroughs from 2,188 to less than 1,600.

As a result of the opposition of Democratic politicians, the reduction will not be as drastic as was hoped for. Nevertheless it has already been decided that in Brooklyn the reduction will be from 1,071 to 917 districts, for both registration and election, though not for the primaries this year. This will mean, as against the allowance required for the last election, a saving of \$61,000 in salaries of election officials for this one borough alone. It is offset to some slight extent by the allowance for custodians and instructors. A much greater saving in supplies will doubtless accrue, as well as in rent cost because of the fewer polling places needed. The opposition to greater reduction in the number of districts took the form of a plea that it was against the convenience of the voters. The secretary of the board, however, who is a Republican, pointed out that 700 persons had voted without difficulty on one machine used in 1925, and that in other cities larger numbers had been accommodated. When the redistricting has been completed it will be possible to compute the real economy, as well as the efficiency, in the use of machines.

### 119. POSITION OF THE POLITICAL PARTY

The political party has played an important part in government ever since our system was put into operation, but for a long time its position was that of an extra-legal institution. Not until 1866 was the party recognized at all in the statutes of any state. In that year laws were enacted in California and New York penalizing the worst abuses in connection with party caucuses and conventions, offering protection against fraudulent practices, but still considering the party altogether a private or voluntary association. By this time, however, every state in the Union has legislation dealing with the political party and regulating its practices in more or less detail. Some states even have constitutional provisions relating to these matters. This change from an extra-legal to a completely legalized institution has not, unfortunately, made the party into a genuine instrument of democracy. The extraordinary part played by the party organization or "boss" and the extent of "invisible government" carried on, were pointed out by so eminent and conservative a statesman as Elihu Root, in speaking to the New York Constitutional Convention of 1915, of which he was president.

**a. Preamble to Oregon Primary Election Law of 1905**

[*General Laws of Oregon, 1905, pp. 8-9.*]

Under our form of government, political parties are useful and necessary at the present time. It is necessary for the public welfare and safety that every practical guaranty shall be provided by law to assure the people generally as well as the members of the several parties, that political parties shall be fairly, freely and honestly conducted, in appearance as well as in fact. The method of naming candidates for elective public offices by political parties and voluntary political organizations is the best plan yet found for placing before the people the names of qualified and worthy citizens from whom the electors may choose the officers of our government. The government of our State by its electors and the government of a political party by its members are rightfully based on the same general principles. Every political party and every voluntary political organization has the same right to be protected from the interference of persons who are not identified with it as its known and publicly avowed members, that the government of the States has to protect itself from the interference of persons who are not known and registered as its electors. It is as great a wrong to the people, as well as to the members of a political party, for one who is not known to be one of its members to vote or take any part at any election or other proceedings of such political party, as it is for one who is not a qualified and registered elector to vote at any State election or take any part in the business of the State. Every political party and voluntary political organization is rightfully entitled to the sole and exclusive use of every word of its official name. The people of the State and the members of every political party and voluntary political organization are rightfully entitled to know that every person who offers to take any part in the affairs or business of any political party or voluntary political organization in the State is in good faith a member of such party. The reason for the law which requires a secret ballot when all the electors choose their officers, equally requires a secret ballot when the members of a party choose their candidates for public office. It is as necessary for the preservation of the public welfare and safety that there shall be a free and fair vote and an honest count as well as a secret ballot at primary elections, as it is that there shall be a free and fair vote and an honest count in addition to the secret ballot at all elections of public officers. All

qualified electors who wish to serve the people in an elective public office are rightfully entitled to equal opportunities under the law.

The purpose of this law is better to secure and to preserve the rights of political parties and voluntary political organizations, and of their members and candidates, and especially of the rights above stated.

### b. Speech of Elihu Root

[*Revised Record, New York State Constitutional Convention, 1915, vol. IV, pp. 3501-3502.*]

We talk about the government of the constitution. We have spent many days in discussing the powers of this and that and the other officer. What is the government of this state? What has it been during the forty years of my acquaintance with it? The government of the constitution? Oh, no; not half the time, or halfway. When I ask what do the people find wrong in our state government, my mind goes back to those periodic fits of public rage in which the people rouse up and tear down the political leader, first of one party and then of the other party. It goes on to the public feeling of resentment against the control of party organizations, of both parties and of all parties.

Now, I treat this subject in my own mind not as a personal question to any man. I am talking about the system. From the days of Fenton and Conkling and Arthur and Cornell and Platt, from the days of David B. Hill, down to the present time the government of the state has presented two different lines of activity, one of the constitutional and statutory officers of the state, and the other of the party leaders—they call them party bosses. They call the system—I don't coin the phrase, I adopt it because it carries its own meaning—the system they call "invisible government." For I don't remember how many years, Mr. Conkling was the supreme ruler in this state; the governor did not count, the legislatures did not count; comptrollers and secretaries of state and what not did not count. It was what Mr. Conkling said, and in a great outburst of public rage he was pulled down.

Then Mr. Platt ruled the state; for nigh upon twenty years he ruled it. It was not the governor; it was not the legislature; it was not any elected officers; it was Mr. Platt. And the Capitol was not here; it was at 49 Broadway; Mr. Platt and his lieutenants. It makes no difference what name you give, whether you call it Fenton or Conkling or Cornell or Arthur or Platt, or

by the names of men now living. The ruler of the state during the greater part of the forty years of my acquaintance with the state government has not been any man authorized by the constitution or by the law; and, sir, there is throughout the length and breadth of this state a deep and sullen and long-continued resentment at being governed thus by men not of the people's choosing. The party leader is elected by no one, accountable to no one, bound by no oath of office, removable by no one. . . . But it is all wrong. It is all wrong that a government not authorized by the people should be continued superior to the government that is authorized by the people.

### c. Regulation of Party Organization

[Illinois Primary Election Law of 1927. *Laws of Illinois, 1927*, pp. 459-480.]

AN ACT to provide for the making of nominations by, and the organization of, political parties.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

SECTION 1. The nomination of all candidates for all elective, State, congressional, county (including county and probate judge), city (including officers of the Municipal Court of Chicago), village and town and municipal officers, clerks of the Appellate Courts, trustees of sanitary districts, and for the election of precinct, and State central committeemen, and delegates and alternate delegates to national nominating conventions by all political parties, as defined by section 2 of this Act, shall be made in the manner provided in this Act, and not otherwise; *provided*, the nomination of candidates for electors of President and Vice-President of the United States, and trustees of the University of Illinois, and the election of delegates and alternate delegates at large to national nominating conventions shall be made only in the manner provided for in section ten (10) of this Act; *and, provided, further*, that this Act shall not apply to school elections and township elections or to the nomination of Circuit and Supreme Court judges or judges of the Superior Court of Cook County.

§ 2. A political party, which at the general election for State and county officers then next preceding a primary, polled more than 2 per cent. of the entire vote cast in the State, is hereby declared to be a political party within the State, and shall nominate

all candidates provided for in this Act under the provisions hereof, and shall elect precinct, and State central committeemen as herein provided.

[Then follow similar definitions of a political party within the congressional district, county, city, village, town, or other political subdivision, except townships and school districts.]

§ 3. In determining the total vote of a political party, whenever required by this Act, the test shall be the total vote cast by such political party for its candidate who received the greatest number of votes; *provided, however*, that in applying this section to the vote cast for any candidate for an office for which cumulative voting is permitted, the total vote cast for such candidate shall be divided by that number which equals the greatest number of votes that could lawfully be cast for such candidate by one elector.

§ 8. The following committees shall constitute the central or managing committees of each political party, viz.: A State central committee, a congressional committee for each congressional district, a county central committee for each county, a municipal central committee for each city, town or village, a precinct committeeman for each precinct.

§ 9. The State central committee shall be composed of one member from each congressional district in the State and shall be elected as follows:

At the primary held on the second Tuesday in April, 1928, and at the April primary held every two years thereafter, each primary elector may vote for one candidate of his party for member of the State central committee for the congressional district in which he resides. The State central committee of each political party shall be composed of members elected from the several congressional districts of the State, as herein provided, and of no other person or persons whomsoever. The members of the State central committee shall, within thirty days after their election, meet in the city of Springfield and organize by electing from among their own number a chairman, and may at such time elect such officers from among their own number or otherwise, as they may deem necessary or expedient. The outgoing chairman of the State central committee of the party shall, ten days before the meeting, notify each member of the State central committee elected at the primary of the time and place of such meeting. In the organization and proceedings of the State cen-

tral committee each State central committeeman shall have one vote for each ballot voted in his congressional district by the primary electors of his party at the primary at which he was elected.

(b) At the primary held on the second Tuesday in April, A. D. 1928, and at the April primary held every two years thereafter, each primary elector may vote for one candidate of his party in his precinct for precinct committeeman. The one having the highest number of votes shall be such precinct committeeman of such party for such precinct. The official returns of the primary shall show the name of the committeeman of each political party. Each candidate for precinct committeeman must be a qualified (and in cities where registration is required, a duly registered) voter of and in the precinct where he seeks to be elected precinct committeeman.

All State central committeemen and all precinct committeemen elected under the provisions of this Act shall continue as such committeemen until the date of the April primary to be held two (2) years after their election.

(c) The county central committee of each political party in each county shall consist of the various precinct committeemen of such party in the county. In the organization and proceedings of the county central committee each precinct committeeman shall have one vote for each ballot voted in his precinct by the primary electors of his party at the primary at which he was elected.

(d) The congressional committee of each party in each congressional district shall be composed of the chairman of the county central committees of the counties composing the congressional district, excepting that in congressional districts wholly within the territorial limits of one county, or partly within two or more counties but not coterminus with the county lines of all such counties, the precinct committeemen of the party representing the precincts within the limits of the congressional district shall compose the congressional committee.

In the organization and proceedings of congressional committees, composed, in whole or in part, of precinct committeemen, each precinct committeeman shall have one vote for each ballot voted in his precinct by the primary electors of his party at the primary at which he was elected; and in the organization and proceedings of congressional committees composed of the chairman of the county central committees of the counties within such district, each chairman of such county central committee shall have one vote for each ballot voted in his county by the



primary electors of his party at the last preceding April primary at which precinct committeemen were elected.

(e) The municipal central committee of each political party shall be composed of the precinct committeemen of such party representing the precincts embraced in such city, town or village. The voting strength of each precinct committeeman on the municipal central committee shall be the same as his voting strength on the county central committee.

(f) Each committee and its officers shall have the powers usually exercised by such committees and by the officers thereof, not inconsistent with the provisions of this Act. The several committees herein provided for shall not have power to delegate any of their powers or functions to any other person, officer or committee, but this shall not be construed to prevent a committee from appointing from its own membership proper and necessary sub-committees.

(g) The various political party committees now in existence are hereby recognized and shall exercise the powers and perform the duties herein prescribed until, but only until, committeemen are chosen in accordance with the provisions of this Act.

§ 10. (a) On the first Monday next succeeding the April primary, at which committeemen are elected, the county central committee of each political party shall meet at the county seat of the proper county and proceed to organize by electing from its own number a chairman and either from its own number, or otherwise, such other officers as said committee may deem necessary or expedient. Such meeting of the county central committee shall be known as the county convention. The county convention of each political party shall choose delegates to the State convention of its party; but in any county having within its limits any city having a population of 200,000 or over the delegates shall be chosen by wards, the precinct committeemen from the respective wards choosing the number of delegates to which such ward is entitled on the basis prescribed in paragraph (e) of this section, such delegates to be members of the delegation to the State convention from such county, and the precinct committeemen representing the precincts outside such city shall ballot as a unit in choosing the delegates to which such precincts are entitled on the basis prescribed in said paragraph (e).

(b) All State conventions shall be held on the first Friday after the first Monday next succeeding the April primary at which committeemen are elected. The State convention of each political party shall have power to make nominations of candi-

dates of its political party for the electors of President and Vice-President of the United States and for Trustees of the University of Illinois, and to adopt any party platform, and to choose and select delegates and alternate delegates at large to National nominating conventions.

(c) The chairman and secretary of each State convention shall, within two days thereafter, transmit to the Secretary of State of this State a certificate setting forth the names and addresses of all persons nominated by such State convention for electors of President and Vice-President of the United States, and for Trustees of the University of Illinois, and for delegates and alternate delegates at large to National nominating conventions; and the names of such candidates so chosen by such State convention for electors of President and Vice-President of the United States, and Trustees of the University of Illinois shall be caused by the Secretary of State to be printed upon the official ballot at the general election, in the manner required by law, and shall be certified to the various county clerks of the proper counties by the Secretary of State in the manner as provided in section 59 of this Act for the certifying of the names of persons nominated by any party for State offices; *provided*, that if the general election laws of this State prescribe that the names of such electors be not printed on the ballot, then the names of such electors shall be certified in such manner as may be by such general law prescribed.

(d) Each convention may perform all other functions inherent to such political organization and not inconsistent with this Act.

(e) At least thirty-three (33) days before the April primary at which committeemen are elected, the chairman of the State committee of each political party shall file in the office of the county clerk in each county of the State a call for the State convention. Said call shall state, among other things, the time and place (designating the building or hall) for holding the State convention. Such call shall be signed by the chairman and attested by the secretary of the committee. In such convention each county shall be entitled to one delegate for each five hundred (500) ballots voted by the primary electors of said party in such county at the April primary to be held next after the issuance of such call; and if in such county, less than 500 ballots are so voted or if the number of ballots so voted is not exactly a multiple of 500, there shall be one delegate for such group which is less than 500, or for such group representing the number of

votes over the multiple of 500, which delegate shall have one-five hundredths ( $1/500$ ) of one vote for each primary vote so represented by him. The call for such convention shall set forth this paragraph (e) of section 10 in full and shall direct that the number of delegates to be chosen be calculated in compliance herewith and that such number of delegates be chosen. . . .

§ 43. Every person having resided in this State one year, in the county ninety days, and in the precinct thirty days next preceding any primary therein, who was an elector in this State on the first day of April in the year of our Lord 1848, or obtained a certificate of naturalization before any court of record in this State prior to the first day of January, in the year of our Lord 1870, or who shall be a male citizen of the United States above the age of twenty-one years, shall be entitled to vote at such primary: *Provided, however*, that all women citizens of the United States above the age of twenty-one years having resided in the State one year, in the county ninety days, and in the election district thirty days, next preceding any primary election held therein, may vote at such primary for the nomination of candidates for such offices as such women may vote for at the election for which such primary is held.

The following regulations shall be applicable to primaries:

No person shall be entitled to vote at a primary:

(a) Unless he declares his party affiliations as required by this Act;

(b) Who shall have signed the petition for nomination of a candidate of any party with which he does not affiliate, when such candidate is to be voted for at the primary;

(c) Who shall have signed the nominating papers of an independent candidate for any office for which office candidates for nomination are to be voted for at such primary; or

(d) If he shall have voted at a primary held under this Act of another political party within a period of two years next preceding such primary: *Provided*, participation by a primary elector in a primary of a political party which, under the provisions of section 2 of this Act, is a political party within a city only and entitled hereunder to make nominations of candidates for city offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: *And, provided*, that no qualified voter shall be precluded from participating in the primary of any purely city, village or town political party under the provisions of section 2 of this Act,

by reason of such voter having voted within two years at the primary of another political party.

In cities having a board of election commissioners, the following additional regulations shall be applicable: In such cities only voters, registered as herein provided, shall be entitled to vote at such primary. The registration books prepared for and used at the election then next preceding shall be used for the primary, and any person therein registered shall be entitled to vote at the primary unless he shall have removed from the election precinct or become otherwise disqualified. . . .

§ 44. Any person desiring to vote at a primary shall state his name, residence and party affiliation to the primary judges, one of whom shall thereupon announce the same in a distinct tone of voice, sufficiently loud to be heard by all persons in the polling place. If the person desiring to vote is not challenged, one of the primary judges shall give to him one, and only one, primary ballot of the political party with which he declares himself affiliated, on the back of which such primary judge shall endorse his initials in such manner that they may be seen when the primary ballot is properly folded. If the person desiring to vote is challenged he shall not receive a primary ballot from the primary judges until he shall have established his right to vote as hereinafter provided. No person who refuses to state his party affiliation shall be allowed to vote at a primary.

. . . . .  
Approved July 6, 1927.

## 120. PARTY SLATE-MAKING

Primary laws, which have now been enacted in some form in almost every state, have as their principal purpose the popular control of nominations. These laws presume that properly qualified persons will freely offer themselves as candidates within their respective parties and that the voters within each party will exercise their free choice at the primary between these various candidates. The development of well-defined factions within the parties has, however, led to the practice of "slate-making"; that is, of certain self-appointed leaders agreeing beforehand upon particular candidates, eliminating all others in some manner, and thus limiting the choice of the voter at the polls. The apparent impossibility of avoiding such pre-primary slates has led to the suggestion, notably by Charles E. Hughes when governor of New York, that such slate-making should be definitely provided for by law, in order that it be done in an official and responsible manner. The suggestion has been put into effect in several states, the first and perhaps the most unique being the method provided by the so-called Richards Primary of South Dakota.

## a. Slate-Making in Illinois

[Account in *Chicago Tribune*, Sept. 11, Sept. 23, Oct. 3, 1923.]

Gubernatorial candidates who aspire to lead the fight against Gov. Len Small in the Republican primary next April held a little conference in Chicago yesterday [Sept. 10, 1923]. Party chieftains, in their capacity as factional leaders, were left on the outside. Attorney General Edward J. Brundage was the only group leader to attend and he sat in as a potential candidate.

Others in the conference were John H. Harrison of Danville, State Senator Thurlow G. Essington, Streator; State Senator Otis F. Glenn, Murphysboro; Ex-Lieut. Gov. John G. Oglesby of Elkhart, and S. S. Tanner of Minier.

Secretary of State Louis L. Emmerson and Frank L. Smith were the only possible entries mentioned who did not attend.

The conference had two important results. First, the conferees agreed they should attempt to settle the candidacy matter among themselves. Second, they made an ironclad agreement to stand by the candidate of their own choice in offering him to the party leaders. Inasmuch as all leading contenders except Emmerson and Smith were present, they took the position that they could not be charged with preëmpting the anti-Small nomination.

Plans for consolidating all the Republican forces opposed to the Small administration were discussed at length yesterday [Sept. 22, 1923] at a conference of representatives of six potential gubernatorial candidates at the Hotel Sherman.

In addition to the candidates' representatives, State Chairman Walter A. Rosenfield and former Senator Lawrence Y. Sherman were present by special invitation, and Chairman Rosenfield, authorized to act as spokesman to the press, made the following statement:

"The meeting today was occupied with an informal discussion of the situation as a whole, without any definite attempt to agree on a candidate. What occurred showed the complete accord of those present and the candidates they represent. But it was agreed that it was desirable for those in attendance to consult their principals further and meet again in Chicago a week from next Monday."

The candidates represented and those who spoke for them were the following:

**Attorney General E. J. Brundage**—County Chairman Homer K. Galpin, Chicago, and State's Attorney Fred C. Mortimer, Sangamon county.

**Senator Otis F. Glenn**—Senator James E. MacMurray, Chicago, and County Chairman Charles E. Feirich, Jackson county.

**John G. Oglesby**—C. J. Doyle, former secretary of state, and Speaker David E. Shanahan.

**S. S. Tanner**—Godfrey Luthy, Peoria, and C. E. Aleshire, Chicago.

**Senator Thurlow G. Essington**—William Boyes and A. H. Jones, Streator.

**John H. Harrison**—L. T. Allen, state committeeman, Eighteenth district, and W. J. Parrott, Danville.

United States Senator McKinley is expected home before the next conference, and it is understood he will be consulted before a decision is made by these twelve concerning which of the six candidates shall be agreed upon to oppose Small.

State Senator Thurlow G. Essington of LaSalle county will lead the Republican allied forces in the gubernatorial primary against Gov. Len Small next April.

Senator Essington was selected as the anti-Small candidate for governor last night [Oct. 2, 1923] following an all day caucus at the Congress hotel by representatives of the six candidates who entered the "self-elimination" agreement—Essington, Attorney Gen. Edward J. Brundage, State Senator Otis F. Glenn, John H. Harrison, S. S. Tanner and former Lieut. Gov. John G. Oglesby.

A "ratification" convention of representative Republicans from all parts of the state is contemplated in the near future for the purpose of obtaining endorsement of the action of yesterday's caucus. This convention probably will be held at Peoria.

The "nomination" of the LaSalle county senator came on the twenty-fourth ballot. Besides the twelve representatives who did the balloting those present included United States Senators McCormick and McKinley; ex-Senator Lawrence Y. Sherman, national committeeman; Walter Rosenfield, Republican state chairman; Mrs. Joseph T. Bowen, Illinois woman member of the national committee, and Mrs. George R. Dean, chairman of the Republican women's organization.

Senator McKinley came to Chicago, from his home in Champaign. Neither he nor Senator McCormick expressed a preference among the six candidates during the entire caucus. The

question was left entirely to the twelve delegates, who frequently left the conference to talk with their principals.

Mr. Tanner and Attorney General Brundage left the city hours before the choice was made. The former had a speaking engagement at Shelbyville, and the attorney general had business before the Illinois Supreme Court, which opened its October term yesterday.

The Tanner delegates, it is understood, were the first to swing to Essington after the early ballots. Senator Glenn was next to instruct his delegates for Essington. The two senators are close colleagues and were dominant figures in the "viligante" group that fought the treasury raids and other tactics played by the state administration in the last legislature.

It had been agreed that the winning candidate should receive at least eight votes. The final swing that put Essington over came when Harrison and Oglesby instructed their men for the LaSalle county senator. It was immediately made unanimous.

...

A formal statement announcing the result of the conference was issued by National Committeeman Sherman, who presided. It says:

"Five of the Republican candidates for the nomination for governor have agreed in the interest of harmony and good government to eliminate themselves in favor of State Senator Thurlow G. Essington of Streator and recommend him to submit himself to the Republican voters of this state at the April, 1924, primary election as a candidate able by his nomination and election to assure to the people an efficient, honest and economical administration of the state's affairs and at the same time unite the party to that end.

"The United States senators urged upon the conferees representing the six candidates the duty in this regard, but refrained from influencing or attempting to influence directly or indirectly the action of the several candidates or the members of this conference.

"Mrs. Bowen, national committee-woman from Illinois, and Mrs. Dean, who came on the invitation of Mrs. Bowen, representing the women's Republican organizations of Illinois; Walter A. Rosenfield, chairman of the Republican state committee, and Homer K. Galpin, chairman of the Cook county Republican central committee, all sat in the conference by its unanimous request."

### b. Proposal Conventions in South Dakota

[Clarence A. Berdahl, "The Operation of the Richards Primary." Reprinted from *The Annals* of the American Academy of Political and Social Science, Philadelphia, Pa., March, 1923, vol. CVI, no. 195, pp. 160-163.]

For the selection of candidates and issues, the Richards law provides a very elaborate and somewhat complicated machinery. In two of the steps involved in the complete process (the precinct initiatory elections held in November of every odd-numbered year, and the state-wide primary in March of every even-numbered year) the voter participates directly. But especially important are the representative conventions held by each party in both county and state, for the purpose of proposing candidates and issues, from which final selection is made at the following primary. The county proposal conventions for each party are made up of three proposalmen elected by the respective party voters in each precinct under a regulated caucus system, the so-called precinct initiatory election; while the state proposal conventions are similarly composed of three proposalmen from each county, but chosen for each party by the respective county conventions. Both county and state conventions are, like the party committees, based on the idea of "unit representation," in that each proposalman has a vote equal to one-third the number of votes cast at the last general election in his precinct or county for his party's candidate for governor. The details as to time of meeting, organization, and procedure of all these proposal conventions are carefully regulated in the law.

*Majority and Minority Proposals.*—The plan of an initial proposal of candidates by pre-primary conventions is in accord with the growing desire to attach more official responsibility to the party organization, and has been adopted to some extent by other states, notably Minnesota. The Richards plan is decidedly novel, however, in that it expressly recognizes the existence of opposing factions within a party and provides for an official slate of candidates to be proposed by both the majority and minority factions.

The majority in a proposal convention first selects its candidates and principles. Thereupon the minority, if dissatisfied and if composed of at least five proposalmen, is permitted to "protest" by selecting and filing its own slate. Both the majority and minority (or protesting) slates are given a place on the primary ballot, but without any distinction as to name, both being called merely representative proposals. It is possible for



the voter to distinguish these on the ballot, however, since the majority proposals must be placed in the last column of the ballot, and the minority proposals in the column next to the last. It may be noted also that only two official factions are recognized, the law providing that in case there is more than one group of protesting proposals, those first filed shall be placed on the ballot.

Thus, in the Republican State Proposal Convention of December, 1919, General Wood received 28,599 votes to 15,442 for Governor Lowden, and thereupon became the "majority" candidate for the presidential nomination. Governor Lowden was promptly named as the minority or "protesting" candidate, and as such contested with General Wood for the support of the South Dakota Republicans. Similarly, the Democrats selected President Wilson and former Ambassador Gerard as the majority and minority candidates of their party.

*Independent Proposals.*—In addition to the two "representative" slates that may be put forward by the officially recognized factions in the proposal conventions, the Richards law permits the proposal of an unlimited number of independent candidates for any office by the usual process of a petition with a required number of signatures. In fact, such independent candidates are definitely encouraged in that they are given the first column on the ballot, generally conceded to be the choice position, and are given prior consideration in other respects, in order, as is stated in the law, "to encourage leadership."

The Richards law goes so far in its attempt to encourage such independent leadership within a party, as to provide that any independent candidate for the nomination for President or governor who received as much as 10 per cent of the total party vote at the primary election, shall be recognized as a "leader." The language further seems to require that the protesting or minority proposalmen shall select this "leader" as their candidate at the next election, if he desires to continue his fight for his "paramount issue." This peculiar provision applied in the last campaign to Mr. Richards himself, the author of the law, since he had been such an independent candidate for the gubernatorial nomination in 1920. It was generally expected that Mr. Richards would insist on his right to "leadership," whether the proposalmen would have him or no, but at the last moment he withdrew his claims, and as a consequence there was no minority candidate for that office in 1922. Presumably Mr. Richards' legal claim will have expired by the time of the next primary campaign, although the law is not clear on that point.

Good use has been made of the provision for independent candidacies. Senators Johnson and Poindexter were able in this way to submit their presidential ambitions to the people of South Dakota in 1920, although neither received any consideration from the state proposal convention. So also Mr. Richards himself, decidedly *persona non grata* to the Republican organization, was enabled in the same year to become a candidate for the gubernatorial nomination, and in that way secure a hearing for more of his ideas. The campaign of Mr. Egan in 1922, already mentioned, was also conducted as an independent candidate.

In other words, the method of proposing candidates by an official convention does not by any means preclude other candidates who may not stand in well with the "organization," nor does it necessarily mean that the slate or program is going to be a cut and dried affair. The system does, however, throw a certain responsibility upon the party organization; it is required to show its hand, so that the voters at least know which are "organization" candidates and which are not.

The plan of the Richards law with regard to the selection of candidates is thus much like the plan of Governor Hughes in New York. It is different in that the official slates are proposed by representative conventions instead of by the party committees, thus providing greater opportunity for the voters themselves to determine the selections. It differs also in that the Hughes plan gave the official slate the preferred place on the primary ballot, whereas the Richards law favors the independent candidates in that way. Finally, it differs from the Hughes plan and from any other plan in its distinct recognition of factions within a party.

It is this provision, perhaps more than any other, that is criticized by politicians and organization men. It is said that this prevents party harmony, promotes factional differences, and keeps the state in continuous political turmoil. To a certain extent those criticisms are no doubt well founded, but it seems to the writer that the law is simply a recognition of an obvious fact, perhaps especially obvious in South Dakota, where the Republican party has been split into two well-defined groups—stalwart and progressive—for at least the last twenty years. The Richards law does not require factional proposals, it merely permits them; but it does offer an opportunity for dissatisfaction, where such exists, to assert itself in an organized manner. The voter's task of ultimate approval or disapproval of the party's program and candidates is thus simplified to a degree.

## CHAPTER XIX

### THE INITIATIVE, REFERENDUM, AND RECALL

#### 122. THE INITIATIVE AND REFERENDUM

The initiative and referendum are devices for securing more direct popular participation in the legislative process. As such, they were considered rather radical in character, and were first adopted in this country in 1898 by South Dakota, which was then controlled by the Populists. Since that time a considerable number of states have incorporated provisions of a similar character into their constitutions, but still chiefly in the West. However, the persistent demand for the initiative and referendum gradually penetrated even into the East, and the recent constitutional convention in Massachusetts responded by proposing an amendment embodying these devices, which was adopted in 1918, although by the slender popular majority of 9,000 in a total vote of 333,000. The conservative character of the amendment is shown by the detailed regulations for its application, and particularly by the lengthy list of subjects withdrawn from its operation. The initiative and referendum provisions in South Dakota are, on the other hand, notable for their brevity, the details of their operation being therefore left to the discretion of the legislature.

##### a. The Initiative and Referendum in South Dakota

[South Dakota Constitution, Art. III, Sec. 1, in *South Dakota Manual*, 1925, p. 337.]

The legislative power of the state shall be vested in a legislature which shall consist of a senate and house of representatives, except that the people expressly reserve to themselves the right to propose measures, which measures the legislature shall enact and submit to a vote of the electors of the state, and also the right to require that any laws which the legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions: Provided, that not more than five per centum of the qualified electors of the state shall be required to invoke either the initiative or the referendum.

This section shall not be construed so as to deprive the legis-

lature or any member thereof of the right to propose any measure. The veto power of the executive shall not be exercised as to measures referred to a vote of the people. This section shall apply to municipalities. The enacting clause of all laws approved by vote of the electors of the state shall be: "Be it enacted by the people of South Dakota." The legislature shall make suitable provisions for carrying into effect the provisions of this section.

### b. The Initiative and Referendum in Massachusetts

[Constitution of Massachusetts, Art. XLVIII, in *Manual for the General Court, 1925-6*, pp. 102-112.]

## ARTICLE XLVIII

### I. DEFINITION

Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection; and the popular referendum, which is the power of a specified number of voters to submit laws, enacted by the general court, to the people for their ratification or rejection.

### THE INITIATIVE

#### II. INITIATIVE PETITIONS

SEC. 1. *Contents.*—An initiative petition shall set forth the full text of the constitutional amendment or law, hereinafter designated as the measure, which is proposed by the petition.

SEC. 2. *Excluded Matters.*—No measure that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that makes a specific appropriation of money from the treasury of the commonwealth, shall be proposed by an initiative petition; but if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect.

Neither the eighteenth amendment of the constitution, as ap-

proved and ratified to take effect on the first day of October in the year nineteen hundred and eighteen, nor this provision for its protection, shall be the subject of an initiative amendment.

No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.

No part of the constitution specifically excluding any matter from the operation of the popular initiative and referendum shall be the subject of an initiative petition; nor shall this section be the subject of such a petition.

The limitations on the legislative power of the general court in the constitution shall extend to the legislative power of the people as exercised hereunder.

SEC. 3. *Mode of Originating.*—Such petition shall first be signed by ten qualified voters of the commonwealth and shall then be submitted to the attorney-general, and if he shall certify that the measure is in proper form for submission to the people, and that it is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people within three years of the succeeding first Wednesday in December and that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent, it may then be filed with the secretary of the commonwealth. The secretary of the commonwealth shall provide blanks for the use of subsequent signers, and shall print at the top of each blank a description of the proposed measure as such description will appear on the ballot together with the names and residences of the first ten signers. All initiative petitions, with the first ten signatures attached, shall be filed with the secretary of the commonwealth not earlier than the first Wednesday of the September before the assembling of the general court into which they are to be introduced and the remainder of the required signatures shall be filed not later than the first Wednesday of the following December.

SEC. 4. *Transmission to the General Court.*—If an initiative petition, signed by the required number of qualified voters, has been filed as aforesaid, the secretary of the commonwealth shall,

upon the assembling of the general court, transmit it to the clerk of the house of representatives, and the proposed measure shall then be deemed to be introduced and pending.

### III. LEGISLATIVE ACTION. GENERAL PROVISIONS

SEC. 1. *Reference to Committee.*—If a measure is introduced into the general court by initiative petition, it shall be referred to a committee thereof, and the petitioners and all parties in interest shall be heard, and the measure shall be considered and reported upon to the general court with the committee's recommendations, and the reasons therefor, in writing. Majority and minority reports shall be signed by the members of said committee.

SEC. 2. *Legislative Substitutes.*—The general court may, by resolution passed by yea and nay vote, either by the two houses separately, or in the case of a constitutional amendment by a majority of those voting thereon in joint session in each of two years as hereinafter provided, submit to the people a substitute for any measure introduced by initiative petition, such substitute to be designated on the ballot as the legislative substitute for such an initiative measure and to be grouped with it as an alternative therefor.

### IV. LEGISLATIVE ACTION ON PROPOSED CONSTITUTIONAL AMENDMENTS

SEC. 2. *Joint Session.*—If a proposal for a specific amendment of the constitution is introduced into the general court by initiative petition signed by not less than twenty-five thousand qualified voters, or if in case of a proposal for amendment introduced into the general court by a member of either house, consideration thereof in joint session is called for by vote of either house, such proposal shall, not later than the second Wednesday in June, be laid before a joint session of the two houses, at which the president of the senate shall preside; and if the two houses fail to agree upon a time for holding any joint session hereby required, or fail to continue the same from time to time until final action has been taken upon all amendments pending, the governor shall call such joint session or continuance thereof.

SEC. 3. *Amendment of Proposed Amendments.*—A proposal for an amendment to the constitution introduced by initiative petition shall be voted upon in the form in which it was introduced, unless such amendment is amended by vote of three-fourths of the members voting thereon in joint session, which

vote shall be taken by call of the yeas and nays if called for by any member.

SEC. 4. *Legislative Action.*—Final legislative action in the joint session upon any amendment shall be taken only by call of the yeas and nays, which shall be entered upon the journals of the two houses; and an unfavorable vote at any stage preceding final action shall be verified by call of the yeas and nays, to be entered in like manner. At such joint session a legislative amendment receiving the affirmative votes of a majority of all the members elected, or an initiative amendment receiving the affirmative votes of not less than one-fourth of all the members elected, shall be referred to the next general court.

SEC. 5. *Submission to the People.*—If in the next general court a legislative amendment shall again be agreed to in joint session by a majority of all the members elected, or if an initiative amendment or a legislative substitute shall again receive the affirmative votes of at least one-fourth of all the members elected, such fact shall be certified by the clerk of such joint session to the secretary of the commonwealth, who shall submit the amendment to the people at the next state election. Such amendment shall become part of the constitution if approved, in the case of a legislative amendment, by a majority of the voters voting thereon, or if approved, in the case of an initiative amendment or a legislative substitute, by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on such amendment.

#### V. LEGISLATIVE ACTION ON PROPOSED LAWS

SEC. 1. *Legislative Procedure.*—If an initiative petition for a law is introduced into the general court, signed by not less than twenty thousand qualified voters, a vote shall be taken by yeas and nays in both houses before the first Wednesday of June upon the enactment of such law in the form in which it stands in such petition. If the general court fails to enact such law before the first Wednesday of June, and if such petition is completed by filing with the secretary of the commonwealth, not earlier than the first Wednesday of the following July nor later than the first Wednesday of the following August, not less than five thousand signatures of qualified voters, in addition to those signing such initiative petition, which signatures must have been obtained after the first Wednesday of June aforesaid, then the secretary of the commonwealth shall submit such proposed law to the

people at the next state election. If it shall be approved by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on such law, it shall become law, and shall take effect in thirty days after such state election or at such time after such election as may be provided in such law.

SEC. 2. *Amendment by Petitioners.*—If the general court fails to pass a proposed law before the first Wednesday of June, a majority of the first ten signers of the initiative petition therefor shall have the right, subject to certification by the attorney-general filed as hereinafter provided, to amend the measure so amended which is the subject of such petition. An amendment so made shall not invalidate any signature attached to the petition. If the measure so amended, signed by a majority of the first ten signers, is filed with the secretary of the commonwealth before the first Wednesday of the following July, together with a certificate signed by the attorney-general to the effect that the amendment made by such proposers is in his opinion perfecting in its nature and does not materially change the substance of the measure, and if such petition is completed by filing with the secretary of the commonwealth, not earlier than the first Wednesday of the following July nor later than the first Wednesday of the following August, not less than five thousand signatures of qualified voters, in addition to those signing such initiative petition, which signatures must have been obtained after the first Wednesday of June aforesaid, then the secretary of the commonwealth shall submit the measure to the people in its amended form.

## VI. CONFLICTING AND ALTERNATIVE MEASURES

If in any judicial proceeding, provisions of constitutional amendments or of laws approved by the people at the same election are held to be in conflict, then the provisions contained in the measure that received the largest number of affirmative votes at such election shall govern.

A constitutional amendment approved at any election shall govern any law approved at the same election. . . .

## THE REFERENDUM

### I. WHEN STATUTES SHALL TAKE EFFECT

No law passed by the general court shall take effect earlier than ninety days after it has become a law, excepting laws de-



clared to be emergency laws and laws which may not be made the subject of a referendum petition, as herein provided.

## II. EMERGENCY MEASURES

A law declared to be an emergency law shall contain a preamble setting forth the facts constituting the emergency, and shall contain the statement that such law is necessary for the immediate preservation of the public peace, health, safety or convenience. A separate vote shall be taken on the preamble by call of the yeas and nays, which shall be recorded, and unless the preamble is adopted by two-thirds of the members of each house voting thereon, the law shall not be an emergency law; but if the governor, at any time before the election at which it is to be submitted to the people on referendum, files with the secretary of the commonwealth a statement declaring that in his opinion the immediate preservation of the public peace, health, safety or convenience requires that such law should take effect forthwith and that it is an emergency law and setting forth the facts constituting the emergency, then such law, if not previously suspended as hereinafter provided, shall take effect without suspension, or if such law has been so suspended such suspension shall thereupon terminate and such law shall thereupon take effect: but no grant of any franchise or amendment thereof, or renewal or extension thereof for more than one year shall be declared to be an emergency law.

## III. REFERENDUM PETITIONS

SEC. 1. *Contents.*—A referendum petition may ask for a referendum to the people upon any law enacted by the general court which is not herein expressly excluded.

SEC. 2. *Excluded Matters.*—No law that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that appropriates money for the current or ordinary expenses of the commonwealth or for any of its departments, boards, commissions or institutions shall be the subject of a referendum petition.

SEC. 3. *Mode of Petitioning for the Suspension of a Law and a Referendum thereon.*—A petition asking for a referendum on a law, and requesting that the operation of such law be sus-

pending, shall first be signed by ten qualified voters and shall then be filed with the secretary of the commonwealth not later than thirty days after the law that is the subject of the petition has become law. The secretary of the commonwealth shall provide blanks for the use of subsequent signers, and shall print at the top of each blank a description of the proposed law as such description will appear on the ballot together with the names and residences of the first ten signers. If such petition is completed by filing with the secretary of the commonwealth not later than ninety days after the law which is the subject of the petition has become law the signatures of not less than fifteen thousand qualified voters of the commonwealth, then the operation of such law shall be suspended, and the secretary of the commonwealth shall submit such law to the people at the next state election, if thirty days intervene between the date when such petition is filed with the secretary of the commonwealth and the date for holding such state election; if thirty days do not so intervene, then such law shall be submitted to the people at the next following state election, unless in the meantime it shall have been repealed; and if it shall be approved by a majority of the qualified voters voting thereon, such law shall, subject to the provisions of the constitution, take effect in thirty days after such election, or at such time after such election as may be provided in such law; if not so approved such law shall be null and void; but no such law shall be held to be disapproved if the negative vote is less than thirty per cent of the total number of ballots cast at such state election.

SEC. 4. *Petitions for Referendum on an Emergency Law or a Law the Suspension of which is not asked for.*—A referendum petition may ask for the repeal of an emergency law or a law which takes effect because the referendum petition does not contain a request for suspension, as aforesaid. Such petition shall first be signed by ten qualified voters of the commonwealth, and shall then be filed with the secretary of the commonwealth not later than thirty days after the law which is the subject of the petition has become law. The secretary of the commonwealth shall provide blanks for the use of subsequent signers, and shall print at the top of each blank a description of the proposed law as such description will appear on the ballot together with the names and residences of the first ten signers. If such petition filed as aforesaid is completed by filing with the secretary of the commonwealth not later than ninety days after the law which is the subject of the petition has become law the signatures of

not less than ten thousand qualified voters of the commonwealth protesting against such law and asking for a referendum thereon, then the secretary of the commonwealth shall submit such law to the people at the next state election, if thirty days intervene between the date when such petition is filed with the secretary of the commonwealth and the date for holding such state election. If thirty days do not so intervene, then it shall be submitted to the people at the next following state election, unless in the meantime it shall have been repealed; and if it shall not be approved by a majority of the qualified voters voting thereon, it shall, at the expiration of thirty days after such election, be thereby repealed; but no such law shall be held to be disapproved if the negative vote is less than thirty per cent of the total number of ballots cast at such state election.

## GENERAL PROVISIONS

### I. IDENTIFICATION AND CERTIFICATION OF SIGNATURES

Provision shall be made by law for the proper identification and certification of signatures to the petitions hereinbefore referred to, and for penalties for signing any such petition, or refusing to sign it, for many or other valuable consideration, and for the forgery of signatures thereto. Pending the passage of such legislation all provisions of law relating to the identification and certification of signatures to petitions for the nomination of candidates for state offices or to penalties for the forgery of such signatures shall apply to the signatures to the petitions herein referred to. The general court may provide by law that no co-partnership or corporation shall undertake for hire or reward to circulate petitions, may require individuals who circulate petitions for hire or reward to be licensed, and may make other reasonable regulations to prevent abuses arising from the circulation of petitions for hire or reward.

### II. LIMITATION ON SIGNATURES

Not more than one-fourth of the certified signatures on any petition shall be those of registered voters of any one county.

### III. FORM OF BALLOT

Each proposed amendment to the constitution, and each law submitted to the people, shall be described on the ballots by a description to be determined by the attorney-general, subject to such provision as may be made by law, and the secretary of the

commonwealth, shall give each question a number and cause such question, except as otherwise authorized herein, to be printed on the ballot in the following form:

In the case of an amendment to the constitution: Shall an amendment to the constitution (here insert description, and state, in distinctive type, whether approved or disapproved by the general court, and by what vote thereon) be approved?

Yes.	
No.	
Yes.	
No.	

In the case of a law: Shall a law (here insert description, and state, in distinctive type, whether approved or disapproved by the general court, and by what vote thereon) be approved?

#### IV. INFORMATION FOR VOTERS

The secretary of the commonwealth shall cause to be printed and sent to each registered voter in the commonwealth the full text of every measure to be submitted to the people, together with a copy of the legislative committee's majority and minority reports, if there be such, with the names of the majority and minority members thereon, a statement of the votes of the general court on the measure, and a description of the measure as such description will appear on the ballot; and shall, in such manner as may be provided by law, cause to be prepared and sent to the voters other information and arguments for and against the measure.

#### V. THE VETO POWER OF THE GOVERNOR

The veto power of the governor shall not extend to measures approved by the people.

#### VI. THE GENERAL COURT'S POWER OF REPEAL

Subject to the veto power of the governor and to the right of referendum by petition as herein provided, the general court may amend or repeal a law approved by the people.

#### VII. AMENDMENT DECLARED TO BE SELF-EXECUTING

This article of amendment to the constitution is self-executing, but legislation not inconsistent with anything herein contained may be enacted to facilitate the operation of its provisions.

### 123. THE ILLINOIS PUBLIC POLICY LAW

\* This law, enacted in 1901 and still in force, is not a true initiative but represents an attempt to give the people some voice in legislation without

making their action legally controlling. It allows an expression of opinion by the people that such and such a law should be enacted, but leaves the legislature free to ignore such expression of opinion if it sees fit. In practice, the legislature has frequently done so, with the result that the law is not as frequently invoked now as it was soon after its enactment.

[*Laws of Illinois, 1901, p. 198.*]

*An Act providing for an expression of opinion by electors on questions of public policy at any general or special election.*

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That on a written petition signed by twenty-five per cent of the registered voters of any incorporated town, village, city, township, county or school district; or ten per cent of the registered votes [voters] of the State, it shall be the duty of the proper election officers in each case to submit any question of public policy so petitioned for, to the electors of the incorporated town, village, city, township, county, school district or State, as the case may be, at any general or special election named in the petition: *Provided*, such petition is filed with the proper election officers, in each case not less than sixty (60) days before the date of the election at which the question or questions petitioned for are to be submitted. Not more than three propositions shall be submitted at the same election, and such proposition shall be submitted in the order of its filing.

§ 2. Every question submitted to electors shall be printed in plain, prominent type upon a separate ballot, in form required by law, the same as a constitutional amendment or other public measure proposed to be voted upon by the people.

APPROVED May 11, 1901.

## 124. THE INITIATIVE AND REFERENDUM IN 1925 AND 1926

The comparative success or failure of such devices as the initiative and referendum can be determined only by careful study of them in actual operation. Some studies, such as the following, have been made and throw much light upon the real character of these "newer institutional forms of democracy."

[Ralph S. Boots, "The Initiative and Referendum in 1925 and 1926," *National Municipal Review*, vol. XVI, pp. 642-647 (Oct., 1927).]

During the year 1926 the voters in thirty-six of the forty-eight states passed judgment at the ballot box upon 194 measures,

of which 137 were proposals of constitutional amendment. These numbers may be compared with totals of 234, 174, and 214 for the years 1924, 1922, and 1920, respectively, of which 186, 92, and 160 were proposals of constitutional amendment. In 1920 amendments were voted upon in thirty-two states; in 1922 in twenty-three states; in 1924 in thirty-one states; and in 1926 in thirty-two states.

In 1920, measures passed by legislatures and referred to popular vote by petition numbered sixteen in eleven states; the corresponding figures for the three later years were thirty-two in seven states, fourteen in six states, and eleven in seven states. Forty-three proposals were initiated by petition in eleven states in 1920; the corresponding figures for the later years were forty-two and twelve, twenty-six and ten, and thirty-six and twelve. The variation in these numbers seems to be entirely without significance.

Of the 194 proposals voted upon last year, 116 were approved and 78 rejected; of the 147 propositions submitted by legislatures, of which 126 were constitutional amendments, 101 were accepted and only 46 disapproved. In only eleven instances in states employing the referendum was any group of voters sufficiently dissatisfied with the legislative product to petition for a chance to reject it, and in seven of these instances the popular vote bore out the petitioners' hopes. This ratio, however, is not as favorable to the petitioners as usual, for in 1924 only two of the fourteen referred measures survived, and in 1922 only nine of thirty-eight, although in 1920 seven of the sixteen subjected to the gauntlet ran it successfully.

Last year Arizona voters turned down a measure generally regulative of stock quarantine, slaughter, and sale of meat; in California a proposed tax of two cents a pound on "oleo" was rejected; in Oklahoma the people prevented the repeal of the labelling of convict-made goods and of the free textbook law. In Oregon a covering of 10 per cent of the fee receipts of most state boards into the general treasury fund was defeated as well as an excise tax upon tobacco; in South Dakota the voters opposed a change in the personnel handling the depositors' guarantee fund. In only seven of the twenty referendum states was any measure "referendumed." This, of course, does not necessarily indicate fully the deterrent influence of the "gun behind the door" upon the legislators.

The voters rejected more than twice as many initiative proposals, including constitutional amendments, as they accepted,

the "anti" votes being twenty-five and the "pro" votes eleven. In 1924 the figures were twenty and six; in 1922, twenty-eight and seven (disregarding seven Oregon propositions for which the returns were not printed in the Review); and in 1920, twenty-six and sixteen.

The eleven successful proposals will be briefly described. Some were constitutional amendments. Thus Arkansas forbade the legislature to pass any special or local law, and authorized the cities of the first and second classes to incur debts for certain terms by means of serial bonds. In the same manner California adjured the legislature to reapportion the state assembly and senatorial districts after each federal census according to a definite plan and created a reapportionment commission to act if the legislature should fail. The voters of Illinois desired Congress to permit the states to regulate the use of alcoholic beverages not in fact intoxicating.

The legislature of Missouri was authorized to empower cities to establish pension systems for police officers. Montana voters repealed the state prohibition enforcement act and raised the "gas" tax from two to three cents. The citizen lawmakers in North Dakota levied a two-cent "gas" tax upon themselves. A scheme for testing in advance the legality of any tax levy was adopted in Oklahoma only to have the supreme court hold the plan unconstitutional. Salmon fishing was strictly regulated by an initiated measure approved by the electors of Oregon.

It will be noticed that the average number of propositions voted upon per state was five and one-half, both in the states employing the initiative and referendum and in the others which permit popular votes only on constitutional measures. In six states only one question was subject to popular scrutiny, in nine states, two, and in five states three. Thus twenty states averaged about one and one-half measures each. The other sixteen averaged ten measures each, the four highest being California, South Carolina, Oregon and Louisiana with twenty-eight, twenty-eight, nineteen and fourteen, respectively. Two of these four states use the I. and R. and two do not. Among the electorates to whom four or more propositions were submitted, there was only a fair degree of wholesale approval or rejection; to be exact, in six out of sixteen such cases.

Of the 116 measures approved, only nineteen received over 50 per cent of the vote cast for officers at the same election. The propositions which were approved by the smallest percentages of the total vote cast were generally constitutional amendments sub-

mitted by the legislature. North Carolina adopted an amendment by the affirmative vote of 13 per cent of the total election vote and South Carolina approved twenty-seven of the twenty-eight propositions appearing on the ballot by percentages ranging from 17 to 20. Texas voters equalling 30 to 34 per cent of the total were sufficient to write four proposals of amendment into the constitution. California voters approved two uninteresting amendments by a 32 per cent vote.

Turning to an examination of the degree of interest manifested in law- or constitution-making as indicated by the vote, one finds that in Idaho, Indiana, Maryland, North Carolina, South Carolina, New Mexico, Florida (one measure), and Texas (one measure), the total vote for and against propositions fell below half of the highest vote for officials. The Carolinas hold low place here, with 20 and 33 per cent participation. Upon a series of bond issue proposals, the participation of Rhode Island voters ranged from 31 to 40 per cent of the vote for candidates and all were accepted by affirmative votes of 21 to 35 per cent of the total.

The lowest participation upon an initiated measure reached 61 per cent of the total vote (in Arizona), and the lowest affirmative percentages for successful measures were 36 in California, 43 in North Dakota, and 44 in Oregon and Arkansas. First honors for the greatest interest in a proposition go to Montana, where 102 per cent of the highest vote cast for officials expressed itself on the repeal of the prohibition law and an increase in the gasoline tax (initiated measures). Arkansas voters were by no means laggards, 95 per cent of those coming to the polls having voted on the full-crew law. The same per cent of the total was cast in South Dakota upon a referred proposition; 96 per cent expressed an opinion upon the sale of beer in Wisconsin; and 98 per cent voted on the method of selecting levee commissioners in Mississippi.

The state averages are perhaps the most significant figures in the study of popular interest. They ranged from 23 per cent in North Carolina, up through 34 per cent in South Carolina, 36 per cent in Idaho and Rhode Island, 38 per cent in Indiana and 39 per cent in New Mexico, to 87 per cent in Arkansas, 88 per cent in Maine, 94 per cent in Montana, 95 per cent in South Dakota and 97 per cent in Mississippi. On all measures for all states this average (percentage of the total vote which was cast on propositions) was  $65\frac{2}{3}$  per cent; on constitutional amendments it was 64 per cent; on measures referred by the legislature



it was 67 per cent; on measures referred by petition, 78 per cent; on initiated measures, 78 per cent. The 1924 figures were somewhat lower for the first three types of measures, and higher for the last two.

In the initiative states the average for all measures was 77 per cent, and in the other states, 57 per cent.

An attempt to classify the measures as political, financial, social, and economic or industrial, upon the basis of the nature of their content or purpose, gave the results appearing in the accompanying table.

Of the financial measures twenty-three were submitted by the legislature of South Carolina in order to except various local government areas from the constitutional limitations imposed upon their powers to incur indebtedness. These all passed, but in 1924 thirty-nine similar proposals failed.

Judson King, director of the National Popular Government League, classifies the measures voted upon in the I. and R. states as follows: "Thirty-six related to changes in the structure of government or the administration of government, or the processes of political action; twenty had to do with changes in the taxation system or the rate and methods of taxation; four related to public ownership or regulation of public utilities; ten dealt with education, including both the universities and the public school systems; six were anti-prohibition; four were concerned with farm and labor legislation." The others were miscellaneous.

Extensive comment on particular proposals is hardly worth while. Probably the most strikingly uniform attitude of the voters is their opposition to any increase in official salaries, notably those of legislators. Only in Maryland and Georgia were authorizations of higher pay approved, in both cases for judges. Legislators must still be content with five dollars a day in North Dakota, South Dakota, Idaho, Washington, and New Mexico, and with six dollars a day in Oklahoma. The increases proposed were not unreasonable in any instance. The same popular attitude, displayed in 1920 and 1922, was attributed to declining prosperity, but this explanation can hardly suffice now. The voters seem to demand in many cases that officials serve at a distinct financial sacrifice, whether because they think that more capable officials can be secured on such terms, or because the persons willing to become candidates are worth no more than they are being paid, or because the honor of office is sufficient reward, or because, as Governor Peay of Tennessee hinted broadly, there

## ANALYSIS OF MEASURES VOTED ON BY THE PEOPLE

<i>Type of Measure</i>	<i>Political</i>			<i>Financial</i>			<i>Social</i>			<i>Economic</i>		
	Total	Passed	Failed	Total	Passed	Failed	Total	Passed	Failed	Total	Passed	Failed
Initiated laws or resolutions.....	1	1	0	11	3	8	9	3	6	4	1	3
Initiated amendments.....	5	2	3	2	1	1	3	0	3	1	0	1
Initiated (total).....	6	3	3	13	4	9	12	3	9	5	1	4
Measures referred by petition.....	1	0	1	2	1	1	6	3	3	2	0	2
Amendments proposed by the legislature.....	52	30	22	44	39	5	13	8	5	17	11	6
Statutes, bond issues, etc., submitted by the legislature.....	2	0	2	12	9	3	6	4	2	1	0	1
Totals.....	64	33	28	71	53	18	37	18	19	25	12	13

are plenty of applicants for the positions at the present rates of pay, cannot be determined.

Bond issues for ordinary purposes were generally approved with notable exception in Kentucky. Exemptions from taxation for the purpose of encouraging industrial development were favored in Arkansas, South Carolina, and Louisiana, and for other purposes in California. Income taxes were defeated in Indiana and Oregon and at the same time in the latter state the voters overwhelmingly defeated a constitutional prohibition of income and inheritance taxes. The classification of property for purposes of taxation was frowned upon in West Virginia and, although nearly 200,000 more Illinois voters favored allowing a vote of two-thirds of the legislature hereafter to free that body from the taxation limitations of the constitution, the requirement of a majority of those voting at the election prevented the adoption of the amendment. Michigan voters again disapproved the employment of excess condemnation by cities, and in Ohio the proposal to assess the cost of acquiring lands for public improvements upon lands benefited rather than upon adjacent lands, went down to defeat.

Propositions which would to a greater or lesser degree have put the state or locality into some business or commercial undertaking were defeated in California, Oregon, Missouri, Michigan and Montana; that is, wherever they appeared upon the ballot.

Perhaps the outstanding case of popular unwisdom was the rejection in Massachusetts (where, by the way, a literacy test prevails); of a proposed 5 per cent and 10 per cent score advantage for veterans and disabled veterans, respectively, in civil service examinations, to replace the present practice of placing veterans above all others on the eligible list. This action contrasts unfavorably with that of New York a few years ago. The committee of the General Court, it must be admitted, had recommended the defeat of the measure, including in its report, which becomes part of the publicity pamphlet, the statement that the present law had been enacted in 1919 at the recommendation of Governor Coolidge and that under it "of the total number of appointments made barely fifty per cent were veterans." Ohio voters decisively refused to withdraw from the Constitution the requirement of the use of the direct primary for all nominations. They apparently believe much more firmly in the direct primary in the abstract than they believe in their ability to use it for the nomination of candidates who will not destroy it.

Upon the assumption that fifty-four of the proposals voted

upon in the states employing the initiative and referendum were questions upon which the action of the voters might reasonably be described as progressive or conservative, Mr. King concludes that the people in these states voted progressively thirty-nine times and conservatively fifteen times. The writer has not attempted to examine the justification for this conclusion (the specific measures rated were not presented in Mr. King's survey) and consequently expresses neither agreement nor disagreement. Mr. King discountenances the idea that "the vote goes where the big money goes." He holds that "where a real public opinion has been established regarding an institution with which the voters have had experience, money is of no avail." It has, however, great influence upon the acceptance or rejection of new programs, he concedes.

Inadequate publicity still characterizes the submission of the proposals in many states. The arguments pro and con, when printed in a pamphlet, are sometimes so diametrically opposed and contradictory as to the purpose of the proposition, that even the most intelligent voters must feel shaky and uncertain. The printing in full of a long statute, especially one amending an existing law, is a hopeless way of acquainting the voter with even the elements of his problem. A simple statement of the formal purpose of the proposal, as distinct from its possible results, would be most useful. But who shall be trusted to draft such a description? Court action may be had in some states to assure correct ballot titles and prevent the use of misleading captions. Perhaps this method would safeguard an official description. Political "facts" are notoriously difficult to find, and when found they seem still to be not altogether impersonal.

Of the fourteen constitutional amendments laid before the electorate of Louisiana the New Orleans *Times-Picayune* said: "The average voter was personally interested in one or two and acquainted with their meaning. With respect to the others he probably knew little and cared less. His reading of the amendments as published in advance of the election could bring little enlightenment." A Massachusetts editorial said of the proposed amendment relating to town meetings: "There was no controversy over the referendum, and no reason could be found for any opposition if the question was understood." Yet 160,000 negative votes were cast. This is attributed to the tendency to vote "no" when a question is not understood and to vote "no" on a group when there is an intense eagerness to defeat a particular proposal. It is noted, also, that Boston, Cambridge, Newton,

Lawrence, Fall River, and New Bedford all gave a majority for the defeated veterans' preference initiative, and the suggestion is offered, as a reason for this divergence from the vote of the rest of the state, that it may have been effected by a radio talk in favor of the proposal from a Boston station the night before the election.

## 125. PROBLEMS OF THE INITIATIVE AND REFERENDUM

The introduction of the initiative and referendum in various states has brought with it a number of problems whose solution is by no means simple. In the following selection some of the more important of these problems are stated and possible solutions indicated.

[*Illinois Constitutional Convention Bulletins, 1920, pp. 110-116.*]

**General statement:** In connection with the initiative and referendum several distinct problems present themselves:

(a) The drafting of the measure to be submitted under the initiative;

(b) The obtaining of initiative or referendum petitions;

(c) The submission of measures in such a manner that they may be acted upon intelligently by the voters, and

(d) The popular vote upon proposals.

**Draftsmanship:** It may of course be truly said that draftsmanship of laws enacted by representative legislatures is defective, and that the draftsmanship of initiated laws is not materially worse than much of the draftsmanship of laws enacted under the representative system. However this does not deny the need for more expert draftsmanship, but rather asserts the need for such draftsmanship as to representative legislative action as well as with reference to initiated measures, if the initiative is to be adopted.

The relationship between direct and indirect initiation of measures under existing constitutional provisions has already been discussed, and this discussion has a direct bearing upon the problem of draftsmanship of initiated measures. In the states which permit the legislative proposal of alternative measures, the two proposed measures then going to a vote of the people, there is of course no opportunity for improving the initiated measure, and there is an added complexity in the issue presented to the voters. In states where, as in Ohio and Massachusetts, there is an indirect initiative with a possibility of correcting a measure upon the basis of legislative deliberation, there is a possibility of improving

the quality of the measure before it is finally submitted to the popular vote. This was also true under the rejected Wisconsin plan and under a possible combination of the Wisconsin plan with a suggested amendment which was rejected by the general assembly in Illinois in 1913.

Any plan which enables a small group of persons to force a vote upon a proposal without possibility of revision, is to that extent defective. Legislative deliberation upon a proposed draft of a measure is of value, and such deliberation is possible under the Ohio and Massachusetts plans. Under these plans of course there is a somewhat greater degree of delay in submitting measures to a popular vote, unless a special election is called, and special elections are of course expensive.

**Petitions:** . . . The size of petitions varies considerably in the several states. The obtaining of petitions is a matter of some difficulty and expense even though it be recognized that a large number of people sign petitions without very much thought. The obtaining of an 8 per cent petition for an initiative measure becomes of course more difficult the larger the number of voters. The granting of woman's suffrage in Oregon has probably had an appreciable effect upon the number of initiative proposals. In a state like Illinois the difficulty becomes greater, and will be increased by the granting of woman's suffrage. Large petitions on the other hand do not necessarily represent a large sentiment in the community in favor of a measure.

A small petition obtained under careful safeguards is likely to represent much more of an actual public sentiment than a large petition obtained through the hiring of "professional signature getters." A plan such as that which is made optional in Washington, of leaving petitions with registration officers, has distinct merit, although such a plan would materially increase the difficulty of obtaining a large petition.

In a number of states a certain geographical distribution of petitioners is required, and this seems desirable in order to make sure that the measure being petitioned for is not merely one sought by people in a particular community. However, the state of Illinois presents a problem somewhat different from that of almost all of the states which have adopted the initiative and the referendum, although Maryland and Massachusetts are perhaps most comparable. In the state of Illinois there is one county with very nearly half of the population of the state, and some method will have to be devised to make sure that initiative petitions represent not merely a sentiment within that county, and

also that the initiative and referendum if adopted will not be employed to impose legislation upon that county by the rest of the state.

If an initiation is to be indirect, with a possibility of amending the proposal before its submission, upon the basis of legislative deliberation, there may be no great need for a large petition. In fact the need for a petition to present the measure to the legislature hardly exists at all, and if a plan of this sort be adopted, the petition may come after the legislative deliberation as in the case of the Ohio supplementary petition. In such a case a petition need not be large, if it may be employed only in the case where a proposed measure has received the support of a certain number of members of the general assembly.

**Submission to the voters:** The problems of ballot title and of arguments upon measures may properly be left to the legislature, although these are highly important matters from the standpoint of any effective operation of the initiative and the referendum.

Under the constitutional provisions of a number of states alternative and competing measures are expressly permitted, several states providing that alternative measures shall be submitted in such a way that the vote shall be in the alternative. The submission of directly competing measures, either by provisions for alternative measures or otherwise, is apt to lead to grave confusion in the minds of most intelligent voters, and this plan should be avoided if possible in the adoption of any initiative and referendum scheme.

A popular vote is of little value:

(1) If the questions submitted are so trivial or so local in character as not to be of interest to those to whom they are submitted.

(2) If the questions are so complicated and technical that the voter has no satisfactory means of informing himself regarding them.

(3) If the questions are submitted in such great number that the voter, even if he might possibly render a satisfactory judgment upon any one of them, can not inform himself regarding the merits of all the measures upon which he must pass.

It has already been suggested that many constitutional amendments submitted to voters are local or trivial, and the same statement may be made of many laws or proposed laws submitted through the initiative and referendum. However, the legislative proposals submitted through the initiative and referendum have in the main related to matters of general interest. The publish-

ing of arguments upon measures of course meets in part the problem of informing voters upon matters to be submitted to them, although it can hardly be said that the so-called publicity pamphlets have in any state fully and satisfactorily informed the voters upon all measures to be submitted.

If the initiative and referendum are to be adopted, however, it seems unwise to specify in detail matters to which they are not to be made applicable. This plan which has been adopted in Massachusetts seems less desirable than some plan of applying the initiative and referendum so that it will limit itself automatically to matters of distinct general interest.

**Popular vote:** . . . The more common provision in this country is that measures submitted to the people shall be adopted upon approval by a majority of those voting thereon. The experience of Colorado in the adoption of a number of important matters when less than 30 per cent of the voters expressed themselves either way, raises some doubt as to the validity of the plan of adopting merely upon the vote of the majority of those voting thereon. It is, of course, at the same time quite clear that to require a majority of those voting at a general election makes the institution substantially unworkable, no matter how great the popular interest may be, and this statement is particularly applicable with respect to the present constitutional provisions of Illinois regarding the amendment of the constitution.

A great deal has of course been said about the initiative and referendum as minority government, under any plan which provides for the adoption of a measure without a majority of the total vote at a general election. Of course it may be replied to this that very little of our government in the election of public officers is majority government. A plurality elects the highest state officers, as a plurality of the popular vote has often resulted in the election of a president. This statement applies to the heads of tickets who obtain the highest vote, the vote by which, generally, the highest vote in an election is measured, when a proposed measure requires for its adoption a majority of the total vote in the election. When examination is made of those offices which appear lower upon a ticket in a general election, it will often be found that elections are determined by a plurality of the votes, and it will frequently be found that the total vote for such lesser officers is much less than that for the more important offices in the election. It is probably true that the majorities of many state legislatures are majorities elected not by a majority of the total vote at a general election, and it is sometimes true that the



majorities in state legislatures may represent a very distinct minority of the total popular vote.

In view of this fact there is much plausibility in the statement that a total affirmative vote of 35 per cent such as is required in Nebraska for the adoption of popular measures, represents fully as much of a popular expression as does the voting upon candidates for the legislature.

However this may be, it is true that if the initiative and referendum are to be adopted, to require a majority of the highest vote cast in a general election in order to carry measures submitted to popular vote is to make such an institution substantially unworkable. If the initiative and referendum are to be adopted and are to be employed as instruments of government some other basis is likely to be taken.

In this connection, reference should be made to the influence of the form of ballot upon popular voting on measures. A full discussion of this subject will be found in the pamphlet dealing with the subject of the amending article of the constitution. With a ballot such as that now used in Illinois, the requirement of a majority of those voting at a general election has the effect of counting in the negative all who do not vote on the question. However, it is possible to devise a ballot which will accomplish precisely the opposite result.

**Emergency measures and the referendum:** Most of the states which have the initiative and referendum make a distinction between emergency measures which shall not be subject to the referendum and other measures which shall be subject to the referendum upon petition. In a number of cases legislative measures which are to go into effect at once must be adopted by higher legislative majorities. The distinction between emergency and other measures is of course based upon the notion that other measures shall be suspended for a certain time after legislative passage to await a possible referendum petition. In a few cases the plan has been adopted of discarding the distinction between emergency and other measures, thus permitting all measures to come into effect at once subject to a popular referendum which will operate as a repeal. Such a plan does away with two very serious difficulties under the plan which contemplates emergency measures:

(a) The declaration of emergencies in cases where no real emergency exists in order to avoid the referendum. In some states this of course would not avoid the referendum, but would

lead almost necessarily to litigation as to whether the emergency actually exists.

(b) The filing of a referendum petition as a means of delaying the operation of a measure enacted by the legislature, with little or no notion that the measure would finally be rejected by the people.

Of course the plan of bringing all laws into operation at once, subject merely to a repeal by means of a referendum, would be open to some abuse in that the result sought by the measure might be accomplished before the possibility of such repeal. The plan here referred to, however, could be tied up with a plan for special elections in exceptional cases. There is a tendency to prohibit the use of the referendum upon regular appropriations, and it is with respect to regular appropriations that the lapse of time would in most cases involve the accomplishment of the purpose sought by the legislation.

**Relation between the initiative and referendum and the regular legislature:** The tables already given indicate perhaps with sufficient clearness that the initiative and referendum are not in any detailed way substitutes for the ordinary process of legislation, although several of the elections (separately analyzed) would seem to indicate that in certain instances this might be the case.

For example, in South Dakota between the years 1899 and 1917, two thousand five hundred and seventy-three laws were passed, whereas seventy-three acts and constitutional amendments were submitted to a popular vote, and of these fifty were proposed constitutional amendments, leaving but twenty-three as submissions of laws, and of the laws submitted but eight were adopted. For the state of Oregon between the years 1904 and 1919, two thousand six hundred and fifty-four laws were passed by the legislature. During the same period one hundred and seventy measures were submitted to a popular vote, of which eighty were proposed constitutional amendments, leaving but ninety proposed laws submitted to the people, of which thirty-five were adopted. However there have been some tendencies in the initiative and referendum toward the provisions which will necessarily increase the number of measures to be submitted to the people. In a number of states there has been a tendency to provide that laws enacted by the initiative, and in some cases that laws submitted to and approved upon a referendum, shall be amended or repealed only upon the basis of a popular vote. Repeals or amendments of such laws would without such a pro-

vision normally be subject to a popular vote if the people were sufficiently interested to submit a referendum petition, and there is a distinct disadvantage in making it necessary to submit such measures to the people. Provisions of the sort just referred to increase the compulsory referendum; that is, make a popular vote necessary in order to accomplish a certain purpose, and as has been suggested above, the compulsory referendum, as distinguished from the optional, is now responsible for the submission, not only of the greater number of measures, but also for the submission to the people of a great mass of immaterial detail for whose submission in a great number of cases there has been and would have been no popular demand.

In some states also there is a tendency toward making the use of the initiative easier than the use of the representative body. The constitutional provisions in Nebraska, Arkansas and Mississippi regarding the adoption of constitutional amendments make the passage and adoption of amendments by initiative petitions substantially easier than the adoption of such amendments upon the basis of legislative proposal. The necessary result of this will be to force the use of the initiative as distinguished from the ordinary legislative process. The Nevada constitutional provision previously referred to is one which may be construed as requiring a popular vote to amend or repeal any act of the legislature which has been approved upon a popular referendum, and if so construed would be a distinct means of giving preference to a compulsory popular vote upon measures as distinct from the ordinary legislative procedure.

**Relation between the initiative and referendum and the constitution:** . . . The initiative and referendum provisions of Oregon, Nevada, Missouri, Arkansas, Colorado and Mississippi permit the proposal and adoption of constitutional amendments through the initiative and referendum by precisely the same methods as are employed with respect to the proposal and adoption of ordinary laws. The California constitutional provisions for the initiative and referendum make substantially no difference between the proposal and adoption of constitutional amendments and of ordinary legislation, and little difference is made by the constitution of Michigan. This means that in their formal aspects of proposal and adoption constitutional amendments are in these states placed upon the same basis as ordinary legislation. Not only this, but the requirement in a number of states that amendments or repeals of laws approved by the people be enacted only upon a popular vote places the amendment and repeal

of such legislation upon substantially the same basis, establishing a compulsory referendum for such amendments and repeals in the same manner as for constitutional amendments.

Of course, the constitutional referendum already existed before the adoption of the initiative and referendum for ordinary legislation, but it is possible, as has been done in a number of states, in adopting the initiative and referendum, to continue some formal distinction between statutes and constitutional changes.

Votes under a compulsory referendum have steadily tended to increase in this country, even before the adoption of the initiative and referendum, and this increase in compulsory referenda, (that is, in the measures which must be submitted to the people if changes are to be made) has taken place primarily as a result of the increased detail in state constitutions.

The briefer and less detailed a constitution is, the less frequently will amendments be needed and the more important in fact such amendments are likely to be, although of course even a brief constitution will necessarily contain some matters requiring change and such a constitution should not be unduly difficult to amend.

The placing of numerous details in a constitution has also a direct bearing upon the use of the initiative and referendum if these institutions are to be adopted. If details as to a matter are placed in the constitution and there comes a popular demand for legislation in conflict with these details, two steps must be taken in order to obtain such legislation:

- (1) If an initiative for constitutional change exists, or if the legislature is convinced that there should be constitutional change, a proposed amendment must first be submitted to the people and adopted.

- (2) The way is then, and only then, open for legislative action or for the use of the initiative to propose legislation. That is, putting the detail in the constitution will multiply by two the measures which must be submitted to a popular vote, and will hamper the use of the initiative by forcing two separate steps to accomplish the purpose desired, as distinguished from one if details as to the matter are not included in the text of the constitution.

## 126. SAMPLE BALLOTS

(Sections a, b, and c, which constitute this section, face this page.)

## 127. THE RECALL IN ARIZONA

The popular recall is found mainly in Western states. It was first adopted in this country by Oregon in 1908, and has since been incorporated into the constitutions of a number of states. The Arizona provision is of special interest on account of the peculiar circumstances in connection with its adoption. When Arizona was seeking admission in 1911, the proposed constitution contained a recall provision extending even to judicial officers. President Taft vetoed this constitution, and the judicial recall feature was accordingly stricken out and the territory duly admitted. Thereupon the Arizona constitution was promptly amended to include the original recall provisions, these being therefore among the most sweeping of those in any state.

[Constitution of Arizona, Art. VIII, 1, secs. 1-6; in Kettleborough, *State Constitutions*, pp. 69-70.]

## 1. RECALL OF PUBLIC OFFICERS

SEC. 1. Every public officer in the State of Arizona, holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office. Such electoral district may include the whole State. Such number of said electors as shall equal twenty-five per centum of the number of votes cast at the last preceding general election for all of the candidates for the office held by such officer, may by petition, which shall be known as a Recall Petition, demand his recall.

SEC. 2. Every Recall Petition must contain a general statement, in not more than two hundred words, of the grounds of such demand, and must be filed in the office in which petitions for nominations to the office held by the incumbent are required to be filed. The signatures to such Recall Petition need not all be on one sheet of paper, but each signer must add to his signature the date of his signing said petition, and his place of residence, giving his street and number, if any, should he reside in a town or city. One of the signers of each sheet of such petition, or the person circulating such sheet, must make and subscribe an oath on said sheet, that the signatures thereon are genuine.

SEC. 3. If said officer shall offer his resignation it shall be accepted, and the vacancy shall be filled as may be provided by law. If he shall not resign within five days after a Recall Petition is filed, a special election shall be ordered to be held, not less than twenty, nor more than thirty days after such order, to determine whether such officer shall be recalled. On the ballots at said election shall be printed the reasons as set forth in the petition for demanding his recall, and in not more than two hundred words,

the officer's justification of his course in office. He shall continue to perform the duties of his office until the result of said election shall have been officially declared.

SEC. 4. Unless he otherwise request, in writing, his name shall be placed as a candidate on the official ballot without nomination. Other candidates for the office may be nominated to be voted for at said election. The candidate who shall receive the highest number of votes, shall be declared elected for the remainder of the term. Unless the incumbent receive the highest number of votes, he shall be deemed to be removed from office, upon qualification of his successor. In the event that his successor shall not qualify within five days after the result of said election shall have been declared, the said office shall be vacant, and may be filled as provided by law.

SEC. 5. No Recall Petition shall be circulated against any officer until he shall have held his office for a period of six months, except that it may be filed against a member of the Legislature at any time after five days from the beginning of the first session after his election. After one Recall Petition and election, no further Recall Petition shall be filed against the same officer during the term for which he was elected, unless petitioners signing such petition shall first pay into the public treasury which has paid such election expenses, all expenses of the preceding election.

SEC. 6. The general election laws shall apply to recall elections in so far as applicable. Laws necessary to facilitate the operation of the provisions of this article shall be enacted, including provisions for payment by the public treasury of the reasonable special election campaign expenses of such officer.

## CHAPTER XX

### THE LEGISLATURE: SELECTION AND ORGANIZATION

#### 128. LEGISLATIVE ORGANIZATION AND REPRESENTATION

The method of organizing the legislature—whether into one or two branches—and the plan of electing representatives in that body are fundamental questions about which there is still much difference of opinion. In the following selection, these questions are ably discussed.

[James W. Garner, on Legislative Organization and Representation (Ms.), reprinted by permission of the author.]

#### THE LEGISLATIVE ORGAN

The constitutions of all the states declare that the powers of government shall be distributed among three departments—the legislative, the executive, and the judicial, “to the end,” say the constitutions of Alabama and Massachusetts, “that the government may be one of laws and not of men.” In most of them it is declared that no person or collection of persons exercising the functions of one department shall assume or discharge the functions of any other, and that of New Hampshire adds: “the three departments ought to be kept as separate from and independent of one another as the nature of free government will admit.” In all the states the legislative organ is a bicameral assembly, although the constitutions of a number of states reserve to the people in their primary capacity the power of legislation through the agency of the initiative and the referendum.

In about half the states the legislative organ is officially designated as the “legislature”; in some it is styled the “general assembly”; in three (Montana, North Dakota and Oregon) it is designated as the “legislative assembly”; and in two (Massachusetts and New Hampshire) as the “general court.” In all the states the so-called “upper house” is styled the “senate”; in three (Maryland, West Virginia and Virginia) the “lower house” is styled the “house of delegates”; in four (California, Nevada, New York and Wisconsin) the “assembly”; in one (New

Jersey) the "general assembly"; and in the rest, the "house of representatives."

### THE BICAMERAL SYSTEM

As has been said, all the legislative assemblies at present consist of two chambers or houses having substantially equal powers of legislation, except that in about twenty states the initiation of revenue bills belongs exclusively to the lower house. In nearly all, the constitution declares that the lower house shall have the exclusive power of impeachments, and in all but two, the senate has the power to try impeachment cases. In about one-third of the states the senate has a share in the appointing power, its consent being necessary to the validity of some or all appointments made by the governor. These are the principal differences between the two houses, so far as their powers are concerned.

With the exception of three rather short-lived experiments<sup>1</sup> the single chambered state legislature has never been tried out in the United States. Like the theory of the separation of powers, the principle of the bicameral system has been regarded since the Revolution as an axiom of American political science, the *quod semper*, the *quod ubique*, the *quod ab omnibus*, says Bryce, of American constitutional doctrine.<sup>2</sup> It is a part of the general system of checks and balances which constitutes one of the distinguishing characteristics of both the national and state government, and there have not been lacking respectable authorities who regard it as a necessary feature of representative government. The bicameral system, like the common law, said Francis Lieber, accompanies the Anglican race and everywhere it succeeds.<sup>3</sup> This has been the opinion of the great majority of political writers and publicists, including John Adams, Hamilton, Kent, Story, Curtis, Bryce, and others.

The advantages claimed for the bicameral system may be grouped under three heads. In the first place, where there are two houses one serves as a check upon the haste, carelessness and errors of the other. The smaller and more conservative body tempers the impetuosity and restrains the radicalism of the other. "The need for two Chambers," says Bryce, "is based on

<sup>1</sup> The legislatures of Pennsylvania under the constitution of 1786, of Georgia under the constitution of 1777, and of Vermont under the constitution of 1786 were unicameral in structure. In each of these states, however, there was an executive council which had a limited share in legislation, but it was too restricted to warrant its being considered as a legislative chamber. In 1789 Georgia adopted the full bicameral system; Pennsylvania did likewise in 1790 and Vermont in 1836.

<sup>2</sup> *The American Commonwealth*, edition of 1910, vol. I, p. 485.

<sup>3</sup> *Civil Liberty and Self Government*, p. 197.



the belief that the innate tendency of an assembly to become hasty, tyrannical and corrupt needs to be checked by the co-existence of another house of equal authority. The Americans therefore restrain their legislatures by dividing them just as the Romans restrained their executives by substituting two consuls for one King."<sup>1</sup> A hastily prepared measure is not so likely to be enacted into law when it may be arrested in its course and subjected to the scrutiny and revision of another body of men who may be better qualified to judge of its merits than those who initiated and passed it in the first instance.<sup>2</sup>

Professor Burgess, speaking of the difficult function of interpreting the common consciousness, remarks that the legislature must be so constructed as to best facilitate this object and this requires the existence of a second chamber. "A single body of men," he says, "is always in danger of adopting hasty and one-sided views, of accepting facts upon insufficient tests, of being satisfied with incomplete generalizations and of mistaking happy phrases for sound principles. Two legislative bodies do not always escape these crude and one-sided processes and results, but they are far less likely to do so than is a single body. There is a sort of healthy and natural rivalry between the two bodies, which causes each to subject the measures proceeding from the other to a careful scrutiny and destructive criticism even though the same party may be in a majority in both. In this conflict of views between the two houses lies in fact the only safe-guard against hasty and ill-digested legislation when the same party is in a majority in both houses." Again, he says "The necessity of a double,

<sup>1</sup> *The American Commonwealth*, vol. I, p. 484.

<sup>2</sup> Thus argues Kent, *Commentaries on American Law*, vol. I, sec. XI. To the same effect see Lecky, *Democracy and Liberty*, vol. I, p. 300, and Story, *Commentaries*, vol. I, sec. 550 *et seq.* Martin Van Buren in the New York Constitutional Convention of 1821 (*Debates*, p. 70), thus stated the argument in favor of the bicameral system: "With regard to the first of those objects—the prevention of hasty and improvident legislation—the system of every free government proceeds on the assumption that checks, for that purpose, are wise, salutary, and proper. Hence the division of all legislative bodies into distinct branches, each with an absolute negative upon the other. The talents, wisdom, and patriotism of the representatives could be thrown into one branch, and the public money saved by this procedure; still experience demonstrates that such a plan tends alike to the destruction of public liberty and private rights. They adopted it in Pennsylvania, and it is said to have received the approbation of the illustrious Franklin; but they found that one branch only led to pernicious effects. The system endured but for a season; and the necessity of different branches of the government, to act as mutual checks upon each other, was perceived, and the conviction was followed by an alteration in their Constitution. The first step, then, toward checking the wild career of legislation, is the organization of two branches of the legislature. Composed of different materials, they mutually watch over the proceedings of each other. And having the benefit of separate discussions, their measures receive a more thorough examination, which uniformly leads to more favorable results."

independent deliberation is thus the fundamental principle of the bicameral system in the construction of the legislature. A legislature of one chamber inclines too much to radicalism. One of three chambers or more would incline too much to conservatism. The true mean between conservatism and progress, and therefore the true interpretation of the common consciousness at each particular moment, will be best secured by the legislature of two chambers."<sup>1</sup>

In the second place, the bicameral system, it is argued, furnishes a means of protection to the people against the despotic tendencies of legislative bodies. Thus it not only conduces to the enactment of carefully considered legislation, but is a guarantee of liberty and a safe-guard against legislative tyranny. The natural propensity of legislative assemblies to usurp the powers of the executive and political departments, to overstep their constitutional boundaries and to become omnipotent was touched upon by Hamilton, Judge Story, and other early commentators. The only effective barrier against this danger, said Story, "is to separate the operations of the legislature, to balance interest against interest, ambition against ambition, the combinations and spirit of dominion of one body against the like combinations and spirit of another." "It is far less easy," he said, "to deceive or persuade two bodies into a course subversive of the general good than it is to persuade or deceive one."<sup>2</sup> The bicameral system, said Hamilton, "doubles the security of the people by requiring the concurrence of two distinct bodies in any scheme of usurpation or perfidy where otherwise the ambition of a single body would be sufficient."<sup>3</sup> Burgess, speaking along this line, contends that the bicameral system by preventing legislative usurpation in the beginning avoids executive usurpation in the end. Two chambers are necessary, he says, to preserve the balance of power between the legislative and executive departments. "The single chamber legislature tends to subject the executive to its will. It then introduces into the administration a confusion which degenerates into anarchy. The necessity of the state then produces the military executive, who subjects the legislature to himself. History so often presents these events in this sequence, that we cannot refrain from connecting them as cause and effect."<sup>4</sup>

Finally, it may be argued that the bicameral system affords a

<sup>1</sup> *Political Science and Constitutional Law*, vol. II, p. 107.

<sup>2</sup> *Commentaries*, sec. 558.

<sup>3</sup> *The Federalist*, Ford's edition, p. 412.

<sup>4</sup> *Op. cit.*, vol. II, p. 107.

convenient means of providing representation for the diverse and sometimes conflicting social and economic interests within the state. As is well known, it was this consideration which originally gave rise to the establishment of legislative bodies composed of two or more chambers. It is true that the various orders or estates into which society was divided when the representative system first appeared have largely disappeared and with them the original reason for the establishment of the bicameral system, but other diverse and at times conflicting interests have arisen which according to some authorities should have special representation. Chief Justice Spencer, speaking in the New York Constitutional Convention of 1821, asserted that the function of an upper chamber was not merely to provide a check on hasty and ill-considered legislation, but to furnish protection to the interests of the land-holding and other property owning classes.<sup>1</sup>

With the present notions of democracy, this argument no longer has much if any force. Unless therefore we should return to the earlier ideas of representation, the principal defense of the bicameral system must rest upon its effectiveness as an agency for preventing undesirable legislation rather than as an organization for the protection of the interests of special classes.

Such are the principal arguments in favor of the bicameral system. From the very first, however, there have been publicists and political writers who refused to admit the advantages generally claimed for it. Among the earliest of these opponents were William Penn and Benjamin Franklin. Franklin is said to have compared a double chambered legislature to a cart with a horse hitched to each end, both pulling in opposite directions. In France, the bicameral theory had powerful opponents in Turgot, Sieyès, Condorcet, Robespierre, Lamartine, and other well known publicists.<sup>2</sup> "The law," said Sieyès, "is the will of the people; the people cannot at the same time have two different wills on the same subject—where there are two chambers, discord and

<sup>1</sup> *Debates*, pp. 216-217: "Those who suppose that a second branch of the legislature, the senate, was intended merely as a check upon the first, appear to me to have misunderstood its origin and design. It was intended to be differently composed and differently organized for other purposes than a mere second branch of legislation. The objects of government are the protection of life, liberty and property. These are important and paramount rights; and every wise framer of government will extend its protecting care over all and each of them. The assembly, consisting of greater numbers, elected by all the sound and wholesome part of the adult male population of the State, is more emphatically charged with the protection and preservation of the personal rights, the lives and liberties of the citizens. The senate was intended as the guardians of our property generally, and especially of the landed interest, the yeomanry of the State."

<sup>2</sup> See my *Introduction to Political Science*, pp. 428-430.

division are inevitable and the will of the people will be paralyzed by inaction.”<sup>1</sup> “If a second chamber dissents from the first,” he said, “this is mischievous; if it agrees, with it, it is superfluous.” Since Franklin’s day, however, until very recently, the bicameral idea has been accepted by Americans as an indispensable feature of the check and balance system, and few persons questioned its utility. Apparently, however, there is at present an increasing skepticism regarding the advantages of a second house, and recently the claims made in its behalf have been challenged in various quarters. In several instances, attempts have recently been made to study the actual workings of the system in certain states and to arrive at definite conclusions regarding the results. In every such case, so far as I am aware, the conclusions of the investigators have failed to justify the claims made in favor of the bicameral system. Mr. Lynn Haines in a study entitled *The Minnesota Legislature of 1911*<sup>2</sup>, after a careful examination of the proceedings of the legislature of Minnesota at its session of 1911, reaches the following conclusion: “Either the Senate or the House might well be abolished. In all my observations, extending through several sessions, I have never seen the least excuse or need for the two bodies. On the other hand, the existence of an upper and lower branch makes possible the ‘team work’ which has been used so often and so effectively against the people. I would do away with the Senate. There is already too much ‘check’ in the chief executive and the courts.”

In a book entitled *The Story of the California Legislature of 1913* Mr. Franklin Hichborn presents the results of an even more elaborate study, and he points out that there was a strong sentiment among the members of the legislature in favor of abolishing the senate. This feeling first showed itself in a proposed amendment to the rules, the effect of which would have been to eliminate the check and balance function of the upper house by “putting the committee organization on what was practically a one-house basis.” The proposed rules provided for the appointment of thirty-four committees composed of both senators and representatives to do the committee work of both houses. The chief consideration in favor of the proposed change, says Mr. Hichborn, and one which probably did not occur to the author of the proposal, “was that a two-house legislature has proved unwieldy and ineffective, and anything which promises relief is

<sup>1</sup> Quoted by Laboulaye in *Questions constitutionnelles*, p. 349.

<sup>2</sup> Minneapolis, 1911.

worthy of attention.”<sup>1</sup> Later in the session an amendment was proposed to the constitution providing for a legislature of one house (to be composed of forty members).<sup>2</sup> In the assembly thirty-seven members voted for it and thirty against it. In the senate the vote for it was nineteen as against fifteen. Thus fifty-six members in a legislature composed of 120 members went on record as favoring a single chambered legislature.<sup>3</sup> It was evident from this vote that in one state, at least, the sanctity of the bicameral idea is losing its force.

A third study dealing with the workings of the bicameral system has been made by Dr. David L. Colvin, the result of which has been published in a monograph entitled *The Bicameral Principle in the New York Legislature*.<sup>4</sup> His investigation includes a careful analysis of the work of the legislature at its session of 1910. At this session, he says, 1036 bills were passed by the senate, and of those only sixty-nine were rejected by the assembly; of 1,128 bills passed by the assembly, only 161 were defeated in the senate. In other words, the assembly killed six per cent of the senate's bills and the senate killed fourteen per cent of the assembly's bills.<sup>5</sup> Notwithstanding the double check of each house upon the other, the total number of bills thus defeated did not equal the number disapproved by the mayors of cities to which they were required to be submitted and vetoed by the governor of the state—240 in all. The check of the second house does not seem very effective, says Mr. Colvin, when about one-fourth of the measures passed by the legislature were of such a character as to require the check of the executive veto. Of the 967 bills passed by the legislature, 505 passed both houses without change. The fact that fifty-eight of them were recalled and 102 others were vetoed indicates that the second house failed to fulfill one of the chief functions for which it was created. A goodly number of the senate bills defeated in the house were minor amendments of little importance, while many of the assembly bills which were rejected by the senate were local or special bills, from which it follows that the checking function, small as it was in quantity, was still less in importance. Mr. Colvin's conclusion is that while a few questionable measures passed by one house were rejected by the other, many others more question-

<sup>1</sup> P. 46.

<sup>2</sup> This reform was also recommended by the Commonwealth Club of San Francisco. See its *Transactions* for 1914.

<sup>3</sup> P. 366.

<sup>4</sup> New York, 1913.

<sup>5</sup> P. 81.

able passed both houses only to be stopped by the executive veto which proved to be the more effective check. It can scarcely be claimed, therefore, that the bicameral system provides an effective check on hasty, ill-considered, and careless legislation.<sup>1</sup>

An examination of the legislation of Illinois covering the four sessions of 1907, 1909, 1911, and 1913 reveals a somewhat better showing in favor of the bicameral system than does that of New York for the year 1910, although it is hardly conclusive. At the session of 1907 the senate failed to pass 29 per cent of the house bills, at the session of 1911 it rejected 19 per cent of the house bills, and at the session of 1913 it rejected only 5 per cent of the house bills. The average for the four sessions was 19 per cent. The bills vetoed by the governor for this period was  $10\frac{3}{4}$  per cent of the total number passed by both houses.

Originally the bicameral system was more defensible than now. The senate was much more a body representing different interests from those represented by the house and it was differently constituted. Higher qualifications were usually required for membership in it; senators were elected for a longer term than representatives and they were often elected by a more restricted suffrage. Today they are on the same basis; in many states, senators and representatives are chosen by the same constituency and for the same term, the same or substantially the same qualifications are required for membership in both houses, and both houses represent members instead of particular classes, interests, or political units. Each chamber is in short a mere duplication of the other, neither is more conservative or radical than the other, and each is subject to the same influences. Thus it has come to pass that the state employs two substantially identical organs to perform the same functions. The employment of two supreme courts, one with power to veto the decisions of the other, would hardly be less logical. Obviously under such circumstances the value of a second chamber as an organ of revision and an agency for restraining the radicalism of the other chamber cannot be very great. To realize fully the purposes for which the bicameral system was devised the two chambers must be constituted on different principles. As Francis Lieber has well observed, if the two houses are elected for the same term and by the same electors they amount in practice to little more than two committees of the same assembly; if there are two chambers they should represent different elements—progress and conservation,

<sup>1</sup> P. 180.

innovation and adhesion, etc.<sup>1</sup> Some writers even go to the length of maintaining that the bicameral system subserves no useful function at all when each house is merely a duplicate of the other.<sup>2</sup> Chief Justice Spencer, speaking in the New York Constitutional Convention of 1821, said on this point: "However subdivided the legislature may be in its several branches, if it be composed of persons exactly similar in qualifications, it will be virtually one and the same body. Put one body in an upper house, the other in a lower house; call one lords, and the other commons, it avails nothing; they are but one body, possessing the same feelings, the same sympathies, and the same objects." It was not enough, he added, to give the senate a smaller size and a longer tenure; to justify its existence it must represent a different constituency, and in other respects be constituted on different principles from those of the other house.<sup>3</sup>

One of the staunch arguments in support of the bicameral legislature is that the existence of a second chamber increases the difficulty of getting measures through the legislature by means of corrupt methods, since it is less easy to bribe or otherwise improperly influence two chambers than one.<sup>4</sup> This may be admitted, but those who rely upon this argument overlook the fact that the rule works both ways, since the check thus provided may be the means of preventing the enactment of good measures as well as bad ones, and in practice, this is often the case.<sup>5</sup> The notion sometimes held that the larger the number of members composing the legislature the more difficult it will be to pass a measure through corrupt methods may be seriously questioned. On the contrary, where the legislature is a small single chambered assembly, each member's responsibility can be more definitely fixed, the light of publicity beats more clearly upon his acts by reason of his greater conspicuousness, and the less easy it is for him to be reached by improper influences and to escape responsibility. In a recent book entitled *Second Chambers in Practice* (London, 1911) prepared by a group of English publicists including several members of parliament, a secondary analysis has been made of the utility of bicameral legislatures, and in the main the

<sup>1</sup> *Civil Liberty and Self Government*, p. 198.

<sup>2</sup> For the contrary view, however, see Burgess, *op. cit.*, vol. II, p. 108.

<sup>3</sup> *Debates*, pp. 217-218.

<sup>4</sup> Compare Bryce, *op. cit.*, vol. I, p. 557.

<sup>5</sup> This is the testimony of Mr. G. S. Gilkerson, reading clerk of the Oklahoma state senate for five successive sessions. He says he has reached this conclusion after "a careful watching of the working of the Oklahoma legislature" since the admission of the state to the union. "Unicameral Legislatures," *University of Oklahoma Bulletin*, New Series, no. 77, p. 50.

conclusions of the authors are against the system as appears from the following summaries: "Where there is a federation, utility of the upper chamber is obvious, but in a unitary state it is the reverse of useful, and many colonial states are finding this out. Judging by colonial experience, the upper house is of little use as a safeguard, since it tends to become a reflex of the lower house; the bicameral superstition is gradually dying."<sup>1</sup> Again: "Second chambers are in practice constant sources of friction where they are not mere instruments of delay, and delay can be better provided for by other expedients."<sup>2</sup>

In several states recently proposals for the establishment of a single chamber legislature have been made and they have aroused wide spread discussions. In the Ohio Constitutional Convention of 1912 one of the delegates, Mr. Elsom, made such a proposal and in advocating its adoption he said in criticism of the bicameral system,<sup>3</sup> "Why did England and her colonies have the bicameral system? Because, first, society was of different classes, and each chamber represented a class; and, second, because it was at first believed that one branch would prove a check and balance on the other. Seldom has this proved true in practice. Far more frequently has one chamber hid behind the other, shifted the responsibility for a bad act to the other. Hundreds of times has an unwieldy two-chambered legislature passed acts that could never have passed had it been composed of a few trained, mature men, conscious that they were acting in the limelight of the public eye." In 1913, the governor of Arizona in his message to the legislature recommended an amendment to the constitution providing for the establishment of a one-house legislature,<sup>4</sup> and in the same year, Governor Hodges of Kansas made a similar recommendation to the legislature of that state. He declared that he was satisfied after eight years' service in the state senate that the system of legislation by a two-house assembly was antiquated and inefficient and that the original reasons which led to the establishment of the bicameral system have long since disappeared. The specific proposal of the governor was that a legislative assembly of not more than sixteen members be substituted in the place of the existing two-house assembly of 165 members, one-half of whom might be elected from districts and the other half from the state at large upon a non-partisan

<sup>1</sup> P. 57.

<sup>2</sup> P. 85.

<sup>3</sup> See his article in the *Review of Reviews*, vol. XLV, p. 340.

<sup>4</sup> See his address before the Governors' Conference at Colorado Springs in 1913. *Proceedings*, p. 246.



ballot and for a term of four years.<sup>1</sup> In Nebraska, Oregon, Oklahoma, California, Kentucky, and other states, there has recently been considerable agitation in favor of abolishing the bicameral system. In Nebraska a joint committee of the legislature has lately made a report recommending that in 1916 a constitutional amendment be submitted by initiative petition providing for a legislature consisting of a single house.<sup>2</sup> "We believe," says the committee, "that for Nebraska in its present state of social and industrial development such a legislature may be secured by the election of one body having a membership somewhere between that of the present Nebraska senate and the present house." Among the arguments which it advances in favor of a single chamber legislature are the following:

1. Representative government by the people should be direct and responsible. One body can more directly represent the public will of a democratic people than two or more.

2. Cities all over the civilized world having a larger population and more diverse interests than Nebraska are governed by one body, and the tendency is to make that body smaller with more direct responsibility upon each member than hitherto.

3. The need of representation for different orders or classes of citizens in respect to wealth, education, or social position no longer exists. The spirit of American institutions is to abolish class distinctions in government and to diffuse education and wealth, letting social position take care of itself.

4. In practice it has been found that the so-called "check" between the two houses results in trades and absence of the real responsibility which should be felt by representatives of the people. Nothing is more common than for one house to pass a bill and the members who voted for it to urge the other house to defeat it, or for a little group of members in one house to hold up legislation from the other house until they extort from it what they demand.

5. Deliberation and reflection do not now mark the work of a two-house legislature, which passes most of its acts in the last ten days of the session. A smaller body with a more direct responsibility upon each member arising therefrom will tend to greater deliberation and reflection than the present system.

A proposal for abolishing the state senate of Oregon was sub-

<sup>1</sup> See his address entitled "Distrust of State Legislatures, the Cause and the Remedy," before the Governors' Conference at Colorado Springs in 1913. *Proceedings*, pp. 248, *et seq.*

<sup>2</sup> This report is printed as a bulletin (No. 4) of the Nebraska Legislative Reference Bureau, May 15, 1914.

mitted to the voters of that state in 1912 and again in 1914, and although defeated, it received a very respectable vote.<sup>1</sup> A committee of the Peoples' Power League submitted an argument in favor of the proposed amendment in which it declared that the senate of Oregon prevented the enactment of desirable measures more often than bad ones, that the executive veto, the referendum, and the supreme court provided ample checks against unwise and unconstitutional legislation, that the bicameral system doubled the opportunity and temptation for trading and log-rolling, fraud, failure, extravagant appropriations and general inefficiency, and at the same time largely destroyed responsibility. The present system, also, it said, greatly increased the expense for clerk hire and other expenses. In 1907 the legislature of Oregon, it declared, spent almost ten times as much for clerk hire alone as the one-house legislature of British Columbia did in 1908.

It is also worth remarking that there are already more than 60 legislatures in the world today organized on the single chamber principle, so that the American proposals are not innovations by any means. In Germany there are sixteen such legislative assemblies, eight of the ten Canadian provincial assemblies are unicameral bodies, so are the Swiss cantonal legislatures, most of the provincial districts of Austria and Hungary, and the national legislatures of Norway, Bulgaria, Montenegro, Servia, and various Central American Republics.<sup>2</sup> When the South African union was organized in 1909, not only were the upper houses of all the local legislative assemblies abolished, but the constitution gave the senate of the union no protection after ten years, and there was a strong party in the convention which favored abolishing it outright. In this connection, it may also be remarked that Dr. F. J. Goodnow in his memorandum submitted to the President of the Republic of China recommends a single chamber parliament for that vast Empire. He apparently attaches little weight to the utility of a second chamber as a checking and revising body, and since the country has no land-holding or other aristocracy and no states or provinces to which it is necessary to give special representation, the country has no need of a legislature consisting of two chambers.<sup>3</sup>

<sup>1</sup> In 1914 the vote for the proposal was 62,376 as against 123,429.

<sup>2</sup> See the list in *Bulletin No. 4* of the Nebraska Legislative Reference Bureau, 1914, p. 37; also Temperley, *Senates and Upper Chambers*, p. 9; Marriott, *Second Chambers* (Oxford, 1910), and Harley and others, *Second Chambers in Practice* (London, 1911).

<sup>3</sup> See the full text of this memorandum as printed in the *American Political Science Review* for November, 1911, pp. 541-563.

Finally, it may be remarked that the legislative organs of most of the great cities of America and Europe are unicameral in structure. Among them may be mentioned New York, Chicago, Boston, Cleveland, and San Francisco, each of which contains a larger population than some of the states.

## 129. THE WORKING OF THE BICAMERAL PRINCIPLE

Most of the writings in text-books on political science regarding the bicameral principle are largely repetitions of theories advanced by early writers, such as Hamilton and Story. Only within recent years have careful inductive studies been made of the actual working of this principle in particular legislatures. These studies throw serious doubt upon the validity of the stock arguments in favor of the bicameral system. The following extracts summarize the results of such studies made of the New York session of 1910 and the New Mexico session of 1925.

### a. The Bicameral Principle in the New York Legislature

[David L. Colvin, Columbia University Doctoral Thesis, 1913, pp. 182-191. Reprinted by permission of the author.]

Whatever utility the bicameral system may have in certain situations and under certain circumstances, most of the familiar arguments which have been advanced in its favor seem to have lost much of their potency and some even their pertinency when used in behalf of that system as it exists in an American commonwealth.

Reviewing the arguments summarized in Chapter I in inverse order:

(1) It is no longer the purpose of constitution-makers to give a representation to special interests and classes in the State, particularly to the aristocratic portion of society, in order to counterbalance the undue preponderance of popular elements in one of the chambers. In the first State Constitution of New York, such was the avowed purpose, and in the second Constitutional Convention of 1821 effort was openly made by some of the most learned men in the convention to provide for the continuance of the special representation of the landed class. While special interests may gain control of one house and thus effectively block legislation hostile to them, yet such a contingency is contrary to the general intention of the members of the constitutional conventions.

While one of the strong arguments for the establishment of the United States Senate was to give opportunity for the special rep-

resentation of States, there is no parallel argument which applies in the State legislatures.

(2) The argument that it restrains the propensity on the part of legislative bodies to accumulate power into their own hands seems to have little application while we have the check of the executive and the courts. In any event, the restraining tendency of the second chamber is not evident. The unifying power of the party seems to have nullified the restraining tendency. The lack of self-restraint has been exhibited so much that the people have had to establish a restriction on the legislature by means of additional constitutional limitations.

(3) The next claim for the bicameral system is that it destroys the evil effects of sudden and strong excitement and of precipitate measures springing from passion, caprice, personal influence and party intrigue. This argument is usually connected with the experience of revolutionary bodies or new bodies not yet fully accustomed to representative government, or without the check which State legislatures are accustomed to. It is also put forward by those who have a fear of popular government and is an argument which was more frequently heard in an earlier and transitory period when such a fear was more prevalent. To be a check upon such excitements, passions, and intrigues, it is important that the second house be not subject to the same influences or that there be a delay until there can be a sober second thought. It has been shown that the two houses are subject to the same influences, and that delay is not always interposed. There are possibly occasions when the bicameral system in this respect would be advantageous, but such occasions are in the nature of crises which are not met with in the study of a normal legislative session. It is conceivable that the two-chambered system would be justifiable if once in a considerable period of time it should serve such a desirable purpose. But with the long habituation of the people to customary methods of legislation such crises are scarcely of sufficient frequency or importance to be the determining factor in deciding legislative structure, especially if there are other forceful arguments contrariwise.

So far as the sudden excitement, passion, or caprice with regard to a certain measure in an ordinary session is concerned, there remains the check of the governor and also the opportunity for recall by the house itself on sober second thought. At present, after bills have passed both houses, they are frequently recalled, one hundred and thirty having been recalled in 1910. There were none of the bills which passed one house and were

defeated in the second in 1910 whose passage through the one house could be attributed to sudden and strong excitement or passion, and it is doubtful if any could to mere caprice or prejudice.

(4) The argument that it is more difficult to corrupt or wrongfully influence two bodies than one, and that the present system is a better defense against bad legislation because it requires the concurrence of two bodies instead of one in evil schemes seems apparently to have considerable validity. Yet the investigation has shown that, in the particular session studied, while a few questionable measures were checked by the second house, more of such measures, and those decidedly more questionable, passed both houses and required the check of the governor to stop them. It is not much more difficult to get such measures through two houses than it is to get them through one, provided the support of the party leaders is secured.

Toward measures which lack party support, the second house may become an obstruction whether they are good or bad, although, judging from the per cent. of measures passed, the second chamber can scarcely be renowned for its being a barrier to any class of measures. Yet the obstruction to good measures tends to offset its obstruction to the bad ones. While a great deal of harm can come from bad legislation, the check of the governor, the courts, and the next election all tend to limit that class of legislation. On the other hand, failure to pass good legislation is not likely to meet with censure at the ballot box to the degree that positive action is.

There are many who claim that, as there are likely to be more bad bills than good, it should be the policy to kill as many as possible. But it must be remembered that sometimes failure to pass needed legislation means retrogression and has deleterious results because of the growth and development of interests and influences which make it more difficult to cope with the situation later. Bad bills have other checks than the second house. But if one house is corrupted, it serves as a formidable obstruction to good legislation for the duration of the term of that house, no matter how much the other house, the governor, and the people may desire it.

Owing to the possibility of preventing the passage of hostile bills, special interests have sought to control one house, their objects being made more easy of attainment because of the fact that the existence of two houses makes it more difficult to produce evidence to show when they are either rival or jealous. Of the bills

of 1910 which were defeated or amended by the second house, it cannot be asserted that a single one was lost on account of jealousy or rivalry.

In the exceptional years when the two houses are controlled by opposite parties, the opposition is due to party spirit rather than to the rivalry between the houses. It has been shown in a year when such a situation occurred a small amount of legislation was passed.

(5) The argument in favor of an independent review of legislation by different minds acting under different and sometimes opposite opinions and feelings hardly applies because the two houses are constituted practically alike. The members are subject to like influences. As a rule they are members of the same party and dependent upon the same party organization. In general, they have the same class of constituents, and are subject to the same pressures. There may be a divergence in the sum of the personal equation of the two houses, but it has been shown that the individual is of little importance compared with the strength of party organization with its necessary assumption of responsibility for the legislative action taken.

Upon certain classes of questions, especially those of less importance and those on which the party organization is neutral, the review may be valuable and is not to be minimized. But upon the more important questions on which the party takes a position or those on which the responsibility is serious, the review of the second chamber is not sufficiently independent to accomplish the ends of those who seek such a reconsideration. But upon the minor measures the question remains whether it would be better for fuller consideration in one house or different consideration by two.

One circumstance to be taken into account in requiring a bill to pass through two chambers is that almost always the final action is determined by the second house, which may or may not be the better decision. After the second house took action in only a very few cases was there any effort to make the action of the second house more closely correspond to that of the first. In practice the action of the second house is assumed to be the desirable decision. The first house, in order to get anything, accepts the amendments of the second. In some cases the action of the second house may be an improvement, but in other cases it may be the contrary. In actual practice the two houses seldom seek a middle ground, at least not by formal methods.

(6) When considering the final argument for the bicameral

principle, that it serves as a check on hasty, ill-considered, and careless legislation, there is danger of becoming confused by the great mass of measures with which a legislature has to deal. There are so many bills that careful and adequate consideration is exceedingly difficult in the short period of the session, and with the many demands upon the time of most legislators.

The bicameral system permits consideration by two different bodies. Two hasty considerations may not be as good as one thorough one, but they may be better than one hasty one. The effect of a second consideration is shown by the fact that nineteen per cent. of the bills passing one house were killed in the second, and fifteen per cent. of the bills passing both houses were amended in the second. However, it has been noted that most of the bills defeated were comparatively unimportant ones. The number would probably have been considerably less if the first house had accepted full responsibility.

Two considerations do not necessarily mean a double consideration. There is a tendency to assume that a subject has been considered in the other house when the consideration has been very inadequate; or sometimes one house hastily passes a bill with the expectation that the other house will deal with it more carefully. There is frequently a shifting of responsibility to the other chamber. It is customary for amendments of the second house to be accepted without question. It is also customary to advance bills advocated by the party leaders. The important measures are determined upon by the party leaders and upon these the second chamber is of little additional usefulness in furnishing consideration. The present system tends to make the party boss or group of party leaders the determiners of what shall be passed, as it is the party's function to control both houses.

So far as real consideration is concerned, it was very inadequate in both houses. It would probably be better to have a thorough consideration in one chamber than a hasty, semi-irresponsible one in two. Whether the desired end could be practically achieved is a question whose answer cannot be determined by this investigation. With the opportunities for consideration which one house can afford in the various stages it seems that one chamber might be made sufficient. Whether one or two chambers, there should be provisions for a lessened number of bills, fuller knowledge, greater publicity, increased opportunities for persons outside to make their views known, and more direct responsibility. Mr. Amos's contention in favor of a thorough discussion of one body, instead of successive new discussions, seems

to have weight. It has been observed that the most difficult problems before the session of 1910 had been investigated by joint committees.

With regard to the interposition of delay between the two chambers, it has been shown that this is not sufficiently guaranteed and the more dangerous bills are likely to be those rushed through both houses without much of an interval elapsing.

After reviewing the work of the legislature and considering the bills which the second chamber checked, it can scarcely be claimed that the second chamber is an effective check on hasty, ill-considered, and careless legislation. The bills defeated partake little more of this character than many of the bills passed. The quantity checked was not unimportant, but the quality of the selection did not show great discrimination. More undesirable bills passed than were killed, and the executive was impelled to kill more bills than both second houses combined.

The party has been described as the chief factor in harmonizing the two houses. It greatly lessens the value of the review by the second house. It makes it easier to pass undesirable legislation because it can force it through on the one hand and on the other the individual legislator can escape punishment at the next election by being submerged in the party ticket.

The party can make the consideration as careful and thorough or as hasty as it desires. It can interpose delay or rush the bill through. However, the party has its limitations. It cannot offend the public to the degree of causing a defection which will result in a loss of power. The organization is not always strong enough to rush measures through, and on the great mass of the less important measures it does not aim to dictate. In these cases, the second chamber acts as a check to a certain degree. It has been shown that most of the bills on which there was opposite action by the two houses were of small importance.

The study has of course been made under the situation where there is a two-party system. If the situation should arise when several parties should be represented in one house, none having a majority, there might occur fortuitous or temporary coalitions which would make a second chamber more useful than at present.

It is thus seen that most of the arguments which have been made in behalf of the bicameral system fail of their cogency under the present practice, yet there are one or two which are worthy of consideration.

The bicameral system has the advantage of age and the habitation of the people to it, and the conclusions which can be reached



after studying its operations in one State, chiefly confined to a single year, cannot be decisive enough or of sufficient weight to positively recommend a change in an age-old system, yet the suggestion of the possibility of a modification should not be as much out of place as some would have us believe. Reference has been made to the proposal for a single chamber in Ohio, Kansas, and Arizona, and to the fact that it is in successful operation in seven neighboring provinces of Canada, so it is not beyond the range of practical consideration. The single-chamber system would be in line with the movement for a more direct government as exhibited in the effort for the direct election of senators, direct primaries, commission government, and the initiative and referendum—the effort to make self-government, as President Wilson expressed it, a “straightforward thing of simple method, single, unstinted power, and clear responsibility.”

If the legislature were reduced to a single chamber there would need to be several provisions in order that the strength of the present system might be conserved and the weaknesses eliminated. To this end the body should be comparatively small. Bluntschli pointed out that four eyes are better than two. But that does not prove that four hundred in a legislative body will perform their functions more efficiently than one hundred. It has been shown that, as an amending body, the smaller house is very much superior. It is quite generally recognized that large legislative bodies defeat their own ends and the real legislative power becomes centralized in a small, forceful group which is adapted for decisive action rather than for deliberation or consideration. So it would be better to have the legislative body approximately the size of the present senate, about fifty members.

As the problems with which legislation must deal become continuously more complex and as the State activities become more extended, the need for capable legislators familiar with all phases of State government becomes more imperative, and the aim should be to have men who shall give their entire time to their legislative work. The legislature should be composed of men more expert. Sufficient salary should be given that competent men would be justified in giving the business of legislation their undivided attention.

Reference has already been made to the need of those provisions which would lessen the number of minor local or special bills, safeguard the stages for consideration, provide for the assembling of information, for publicity, for the intervention of

time, and for opportunities for the wishes of the people to be expressed.

These provisions are needed, whether the legislature shall be bicameral or unicameral. If they are adopted in combination with the unicameral system there would be lacking practically none of the advantages of the bicameral system. If they are adopted in combination with the bicameral system the legislative situation would be improved, but there would remain some of the disadvantages of the two-chambered system.

In any event, the trial of a safeguarded unicameral system would not be a very dangerous experiment.

### b. The Bicameral Principle in the New Mexico Legislature of 1925

[John E. Hall, in *National Municipal Review*, vol. XVI, pp. 257-260 (Apr., 1927).]

The very abnormality of the political relationships between the two chambers produced a situation which encouraged the introduction of many bills in the house, the authors knowing at the time of their introduction that they would not pass the senate. Frequently bills were introduced in the house that were mere political gestures, or were designed to provide a little "grandstand" play for the benefit of the home-folk. Each chamber proposed many bills of this nature, for each knew that the other chamber would check them and get the blame. There was a great deal of this "passing the buck," and each chamber pointed an accusing finger at the other body, charging it with obstructing much needed legislation.

The writer knows of several bills that were unwise and undesirable that were passed by the house for political reasons, and left on the door-step of the senate. The senate would either have to take the blame for passing them or shift them back upon the house. House bill number 66 will illustrate this point. It was a bill appropriating money to establish an experiment farm in Union county. Members of the committee on agriculture told the writer that they were opposed to the bill, but would report it favorably and work for its passage to please the representative from that county and his constituents. It was passed and the senate killed it. Space will not permit a study of several other bills that were passed by the house for similar reasons and with the same results.

But this sort of thing is by no means peculiar to New Mexico. A two-chamber legislature always facilitates, if it does not actually encourage, a shifting of responsibility for the bad bills passed and the good bills defeated. The senate charges the house with obstructing desired legislation, and vice versa. Upon which group will the constituents place the responsibility? The farmer in Union county may praise his representative for proposing an experiment farm bill, and condemn the senate for killing it, when, as a matter of fact, the representative himself may have been opposed to the bill and may have betrayed his constituents by framing a bill so defective as to insure its easy defeat in the other chamber. Under such circumstances, senators and representatives cannot be held to strict accountability, for the bicameral system enables them to pass responsibility back and forth like a medicine ball in a "gym" class.

Under a unicameral system, on the other hand, responsibility could not thus be shifted and evaded. The attention of the electorate would be focused upon a single body. Absurd and careless bills, bills to provide political ammunition for coming elections, and many other types of undesirable legislation would not be passed with such nonchalance when the legislative body knows that its action is final and that there is no second chamber upon which to shift responsibility.

There is another question connected with the bicameral system that must be answered: may not two chambers facilitate the defeat of meritorious legislation quite as effectively as they seem to facilitate the elimination of undesirable legislation? Ample material for an affirmative answer is supplied by events in the New Mexico legislature now under consideration. Space, however, permits the citation of only a few examples—first, election reform. New Mexico is encumbered with an awkward, ineffective and wholly inadequate election law, and every election brings a bumper crop of contest cases. After the 1924 elections, there were seven seats in the house contested and four in the senate. The governorship was also contested, and ex-Senator Bursum filed contest notice against Senator Sam G. Bratton in the United States senate. This state of affairs, due to the lax election laws, was indefensible and intolerable. The platforms of both major parties pledged their legislative candidates to the passage of "election reform" laws, and public sentiment was state-wide in favor of this reform. How did the bicameral legislature respond to this demand for legislation?

Five different bills relating to election reform were introduced.

House bill 69 and senate bill 10 both provided for the direct primary for the nomination of state officials. Senate bill 92 was a corrupt practices act, and senate bill 122 was a complete election code. But probably the most detailed and complete election bill introduced was house bill 179. This bill was drafted with the aid of legal experts, parts of it being copied from the laws of Wisconsin, Kansas, and Ohio. It was passed by the house and went to the senate, where it was referred to the steering committee and was not heard of thereafter. Senate bill 10 did not reach the floor of the senate, for it, too, was smothered in committee; and senate bill 92 met a similar fate in the senate judiciary committee. But house bill 69 passed the house and in the senate was referred to the steering committee, where it was buried beyond resurrection. Thus far, four out of the five bills introduced had been killed in senate committees without giving the members of the senate a chance to vote upon them.

On the last day of the session, the majority floorleader in the senate, fearing the condemnation that would fall upon his party if the session should adjourn without a vote upon an election law, called senate bill 122 out of the committee. The roll-call was ordered, whereupon a minority member immediately moved to call house bill 69 out of the steering committee, and to substitute it for senate bill 122. The motion was lost, however, and senate bill 122 was passed by a strict party vote. It was sent to the house an hour before final adjournment. Political expediency again reared its head. The Democratic house felt that the Republican senate bill did not meet all the requirements, and by a strictly partisan vote amended the bill by striking out all after the enacting clause and inserting a copy of house bill 179, which had already been stifled in the senate steering committee. In this amended form, senate bill 122 was returned to the senate where it died on the clerk's desk. The legislature adjourned without enacting any of the election reforms which had been demanded by the people, and had been promised by the legislators. The jealousies between the two chambers defeated the bills; the Democratic house was jealous of the prestige that would come to the Republican senate with the passage of an election law originating in that body, and vice versa.

The manner in which the legislature handled the ratification of the federal Child Labor Amendment also throws some interesting light upon the second chamber as an agency of obstruction of desirable acts. The writer feels safe in saying that the people of the state, on the whole, favored ratification. The Democratic state platform in 1924 contained this plank:

"We pledge Democratic members of the legislature to the ratification of the Constitutional Amendment."

The Republican platform contained this statement:

"We are heartily in favor of the proposed Child Labor Amendment submitted to the states by Congress and pledge the Republican members of the next legislature to its approval and ratification."

The governor, in a special message, also appealed for its ratification. House resolution 4, ratifying the Amendment, passed that body and was referred to the steering committee in the senate, where it died. A majority member of the senate introduced a resolution submitting the question of ratification to the people for their own expression at the polls. It passed the senate, but was killed in a house committee. Here, again, the shifting of responsibility to, and the obstruction of, the second chamber resulted in defeating a desirable end.

Let us consider another example. Lax banking laws, together with an abnormal economic situation in 1922, had caused much distress in the state. The banks were loaded with huge frozen assets, and over half of them failed in that year. Many of the failures were traceable to the inefficient and careless administration of funds. Speculation by bank officials with the depositors' money was made possible by the lax banking laws. Public sentiment demanded a law that should prohibit banks from making heavy loans of a certain type for speculative purposes, and which, in other ways would give greater protection to the depositors. House bill 79 was a complete banking code. It was drafted with the aid of Judge Wright, counsel for the bankers of the state. The bill was acclaimed on all sides as judicious and desirable. It passed the house, but the senate made such drastic amendments that the house would not concur in them; and as the senate had amended it on the second day before adjournment, there was no time for conferences between the two chambers, and so the bill died on the clerk's desk in the senate.

Thus, in at least three types of important legislation, backed by a strong popular demand, the second chamber succeeded in obstructing the enactment of much-needed reforms. The same obstructing tactics were employed by the second chamber in many other instances, but space will not permit specific mention of them here. Enough has been said to demonstrate the power of the second chamber to obstruct meritorious legislation. After this examination of concrete examples, no one should be misled by the large percentage of house bills killed by the senate. The

forty-five per cent. clearly exaggerates the real worth of the second chamber as a checking agency.

And in addition to the large number checked by the second chamber, the governor was compelled to veto seventeen bills, or a fraction over 10 per cent of the total number of bills passed by both houses. This would further indicate that, after all, the second chamber failed adequately to scrutinize, revise, and check the work of the other chamber.

As a result of his personal observation, the writer firmly believes that the bicameral system is a relic of less progressive days. At any rate, the history of the last New Mexico legislature appears to justify the conclusion that a two-chambered legislature is unwieldy, expensive, irresponsible, and inefficient.

### 130. PROPOSALS TO ADOPT THE UNICAMERAL PLAN

The bicameral system is so well established in the American states that any movement for its abandonment seems hardly as yet to be within the field of practical politics. Nevertheless, serious proposals for the adoption of the unicameral plan have been made in certain states, such as Oregon and Kansas. The Oregon proposal was in the form of an amendment to the Constitution of that state submitted to the voters in 1912 and again in 1914. It was on both occasions rejected at the polls, although it received a considerable vote in its favor. The Kansas proposal was in the form of a message by Governor Hodges to the legislature in 1913 which, although not adopted, aroused a great deal of discussion.

#### a. Oregon Plan

[*Oregon Referendum Pamphlet, 1914, no. 350, p. 82.*]

The senate and the office of senator in the legislative assembly of Oregon are hereby abolished. All provisions of the constitution and laws of Oregon in conflict with this section are hereby abrogated and repealed in so far as they conflict therewith. This section is in all respects self-executing and immediately operative.

#### b. Kansas Plan

[*Senate Journal, State of Kansas, 1913, pp. 741-743.*]

THE STATE OF KANSAS, GOVERNOR'S OFFICE,  
TOPEKA, March 10, 1913.

*To the Legislature of the State of Kansas:*

As the legislative duties of the Legislature of 1913 draw to a close, I desire to congratulate the members of both branches

on the magnificent work which they have accomplished. I believe that I am justified in saying that you have worked harder and accomplished more than any Legislature in recent years. Almost every pledge you made to the people last year has been fulfilled.

But I am convinced that this magnificent record is due rather to the efficient membership of this Legislature than to the system.

In common with a large and growing number of thoughtful people, I am persuaded that the instrumentalities for legislation provided for in our state constitution have become antiquated and inefficient. Our system is fashioned after the English parliament, with its two houses based upon the distinction between the nobility and the common people, each House representing the divers interests of these classes. No reason exists in this state for a dual legislative system, and even in England at the present time the dual system has been practically abandoned and the upper House shorn of its importance, and I believe that we should now concern ourselves in devising a system for legislating that will give us more efficiency and quicker response to the demands of our economic and social conditions and to the will of the people.

I have been led to this conclusion by an experience of eight years as a member of the Senate of this state and my convictions on this subject are by no means of recent date. As far back as March 12, 1911, in an interview printed in one of the great dailies, I advocated that our present legislative system be abandoned and that a legislative assembly of thirty members from thirty legislative districts, under the check of the recall, be provided for in its place. The suggestion made at that time met with much favorable comment, and I firmly believe that there is a growing public opinion in its favor.

You senators and representatives can not but have observed the defects of our present system. In a short session of fifty days you are required to study and pass upon hundreds of measures, and the hurry with which this must be done must of necessity result in a number of more or less crude and ill-digested laws, which often puzzle learned jurists to interpret with anything like satisfaction to themselves or to the public. Hundreds of measures also, embodying important legislation, die on the calendar every two years. After a brief session, the Legislature adjourns and the business for one coördinate branch of the state government is absolutely abandoned for a whole biennium, unless the Legislature is convoked in an expensive extraordinary

session by the governor. It is as if the head of an important department of some other "big business" should give only fifty days every two years to its management.

I am aware of the veneration with which ancient institutions are regarded in some quarters, but I see no reason why we should cling to these institutions in carrying on the all-important affairs of the state, when in almost every other activity of life we are discarding old traditions and antiquated methods for newer and progressive ideas and more efficient and economic methods. This Legislature has itself discarded the antiquated and inefficient methods of managing the business of our big state institutions and has concentrated the responsibility in the hands of a few instead of many boards—in a word, has applied to them the principle of government by commission. We have recognized in this state also that the old methods of city government are expensive, inefficient and unsatisfactory, and everywhere the commission plan of city government is being adopted, and in almost every case is yielding high-class results.

For myself, I can see no good reason why this new idea of government by commission should not be adopted for the transaction of business of the state. Two years ago I suggested a single legislative assembly of thirty members from thirty legislative districts. I am now inclined to believe that this number is too large, and that a legislative assembly of one, or at most two, from each congressional district would be amply large. My judgment is that the governor should be *ex officio* a member and presiding officer of this assembly, and that it should be permitted to meet in such frequent and regular or adjourned sessions as the exigencies of the public business may demand; that their terms of office be for four or six years, and that they be paid salaries sufficient to justify them in devoting their entire time to the public business. Such a legislative assembly would not, I believe, be more expensive than our present system. It would centralize responsibility and accountability, and under the check of the recall would be quickly responsive to the wishes of the people.

A legislative assembly such as I have suggested could give ample time to the consideration of every measure, not only in relation to its subject matter, but to the drafting of it in plain, concise and easily understandable language. It would be ready at any time to deal with new conditions and to provide relief in emergency cases, and, with time to inform itself about conditions, and to study the needs of the people, and of our state institu-



tions, there seems to me to be no question but what it would be vastly more efficient than our present system, as well as vastly more economical.

Our present system has been in vogue since Kansas became a state, more than fifty years ago, and in that time we have seen the most remarkable changes in sociological and economic conditions take place. No private business now uses the methods of fifty years ago. In every activity of modern life new and progressive methods have been adopted. By "progressive" I do not mean any visionary scheme of government, but the exercise of that sane, sober and wise judgment which is always ready to throw away antiquated machinery and methods and adopt the latest, most efficient, most beneficent and most economical instrumentalities for accomplishing the greatest good, whether it be in public or in private affairs.

Is there any good reason why political institutions should not change with the changing demands of modern social and economic conditions? I believe not. The leaven of this new idea of modern business methods for modern public business has taken root in the public mind. The people are everywhere talking it over, and I am one of those who believe that the people can be trusted to reach correct conclusions about their own public business when they are given adequate opportunity to study and discuss any subject. As Wendell Phillips said, "The people always mean right, and in the end they will have it right." The people of Kansas are progressive; they know what they want; and give them a chance at the ballot box and they will get it. I am not in sympathy with the idea that any public officer knows better than the people themselves what they want.

I am not asking at this time that any legislative action be taken on this subject, but am calling your attention to this subject now that you may carry back to your people the idea herein expressed and talk it over with them for the next two years, to the end that when you come back to these halls at that time you may know and be of a mind to execute the will of the people of this state on this subject.

I want to thank the members of the Legislature of 1913 for their sincere and earnest efforts to legislate for the best interests of the state, and for the uniform courtesy which they have extended to me, and to assure them of the high personal regard in which I hold each and every senator and representative.

Respectfully submitted,

GEO. H. HODGES, *Governor.*

### c. Proposal of Governor Hunt of Arizona

[*Proceedings of Governors' Conference, Colorado Springs, August, 1913, pp. 246-247.*]

For many years I have advocated a single House, and have joined with those who point out the absurdity of a House and Senate in our form of government. The double House cannot be defended except in the interests of royalty, and that is all of the real defense it ever did get. The original idea was that the king or emperor needed a senate or upper house to protect his royal privileges against any attack by the people through the lower house. In other words, if the king did not like something proposed in the lower house, he could pass word to his own branch, the senate, to defeat the measure. The wonder is that this double system has been maintained so long in a country like ours, whose form of government makes it not only ridiculous, but a vexation and annoyance to all of the best progress in popular government. The single house, with membership restricted to the smallest number compatible with fair representation, would be as effective in doing away with inefficient legislatures as any plan that can be devised. It offers a plan under which the house would have time to attend to public business, but no time or disposition to play petty politics. Ideas along this line have been discussed a great deal of late, and you are doubtless familiar with the different plans. The one which seems to appeal to the majority of thinkers would have a single house consisting of twenty-five or fifteen members, elected to represent all the people, not a party, and subject to the initiative, referendum and recall. Such a governing body would be free to attend to popular reforms and the State's business, and it is not at all likely that it would or could become inefficient. The people would always have the power to recall, or to initiate legislation, or to compel the referendum on any of the acts of the house. It is not my idea to abolish the senate and leave the house as it is, or do away with the house and retain the senate, but to create an entirely new governing body that would simply wipe out the present legislature—a governing body so complete, so responsive to the people, so fully in the glare of publicity, that selfish interests would find it useless to try petty politics. This plan, I am convinced, embodies the next and greatest step toward ideal government by the people, and we have many a step to make in that direction before the battle for human progress is won.

### 131. LEGISLATIVE REAPPORTIONMENT

In order to take account of variations in the growth of population in different parts of the state, the constitutions generally provide that representation in the legislature shall be periodically reapportioned by the legislature itself. The legislature, however, sometimes fails to carry out the constitutional mandate, as has happened in Illinois. Two unsuccessful attempts have been made in that state to remedy this situation; first, by a provision in the proposed constitution of 1922, and, secondly, through judicial action in 1926.

#### a. Plan for Reapportionment in Illinois

[*Proposed Constitution of 1922*, sec. 24.]

If the general assembly fails to make any such apportionment, it shall be the duty of the secretary of state, the attorney general, and the auditor of public accounts to meet at the office of the governor within ninety days after the adjournment of the regular session of the year designated for that purpose and make an apportionment as provided in this constitution.

#### b. Power to Compel Reapportionment

[*Fergus v. Marks* (1926), 321 Illinois Supreme Court Reports, 510, 513.]

Original petition for mandamus to compel the legislature to meet and apportion the state in accordance with the Constitution.

It is apparent that the duty the performance of which is sought to be compelled is clear and unmistakable, so the only question to be determined is whether or not, on legal principles, the writ of mandamus can be issued directed to the members of the General Assembly in their official capacity.

The duty to reapportion the state is a specific legislative duty imposed by the Constitution solely upon the legislative department of the state, and it, alone, is responsible to the people for a failure to perform that duty.

The judicial department of the state cannot compel by mandamus the legislative department to perform any duty imposed upon it by law.

The constitutional provisions are commands of the people to the legislature, but they cannot be enforced by the court.

Writ denied.

### 132. MINORITY REPRESENTATION IN ILLINOIS

In order to prevent sectionalism and to secure representation of minorities in the lower house of the Illinois legislature, the following provision was inserted in the Constitution of that state adopted in 1870. It has accomplished the purpose for which it was originally intended, but has been accompanied by unfortunate results which probably render its further retention in the Constitution unwise.

[*Constitution of Illinois*, Art. IV, secs. 7 and 8.]

The House of Representatives shall consist of three times the number of the members of the Senate, and the term of office shall be two years. Three Representatives shall be elected in each Senatorial district at the general election in the year of our Lord 1872, and every two years thereafter. In all elections of Representatives aforesaid, each qualified voter may cast as many votes for one candidate as there are Representatives to be elected, or may distribute the same, or equal parts thereof, among the candidates, as he shall see fit; and the candidates highest in votes shall be declared elected.

### 133. THE SPLIT SESSION IN CALIFORNIA

The bifurcated session is a device intended to enable the legislature to perform its work more efficiently as well as to induce the people to take a greater interest in, and to exercise a larger control over, the work of legislation. The operation of this device, as found in California, is well described in the following selection.

[V. J. West, in *National Municipal Review*, vol. XII, pp. 372-373 (July, 1923).]

... The amendment adopted in 1911 [which] provides that a session of the legislature, except an extraordinary session, must at the expiration of thirty days after its commencement take a recess for not less than thirty days. Upon reassembling after the recess the legislature may remain in session as long as it sees fit, but an attempt is made to discourage the introduction of new bills.

This so-called "bifurcated session" was advocated by those who proposed it for four purposes. It was argued that, after a thirty-day session during which all the bills which were likely to be considered had been introduced, a thirty-day recess would be useful in giving the members time to consider and digest these measures and reach some conclusions as to their merits. It would also give the public a chance to get acquainted with the problems

facing the legislature and to advise the members so that there might be some chance of a nearer approach between public opinion and legislative action. In the third place it was expected that the legislature might use the thirty-day recess for the purpose of conducting investigations either into the conduct of administrative branches of government or upon such public questions as were most pressing at the time. Finally it was expected that the provision for a recess would prevent the introduction of measures late in the session when they might be rushed through without adequate consideration.

These expectations with respect to the divided session have generally been realized, though not all members use the recess for the purpose intended, nor does the public generally take enough interest in the work of the legislature to inform itself. Nevertheless the recess has been found very useful by chairmen of committees in affording them time for the analysis of bills and in the preparation of committee reports; and the fact that the clerical staff of the legislature is kept busy during the recess in publishing and mailing thousands of copies of bills is indicative of some interest on the part of the public. During the session of 1921 the one month's recess was taken up with a debate over the proposed revision in the tax law which engaged the attention of the citizens from one end of the state to the other. It is not too much to say that this delay afforded the proponents of the measure an opportunity for securing a very wide discussion without which they would have had no chance whatever of securing its passage. It is quite possible that in every session there will be at least one measure of such transcendent importance that a thoroughgoing discussion will be highly desirable if not absolutely necessary. For that reason if for no other the thirty-day recess ought to be continued. Perhaps an equally important advantage will be the opportunity which the recess offers for carrying on legislative investigations. So far not a great deal of experience is available to judge of its significance from this point of view. During the session of 1923 several special committees conducted investigations on a variety of subjects. Most significant of these were the inquiries into the expenditure of money in election campaigns.

With the adoption of a new budget procedure it is possible that the bifurcated session will find another use. The governor is now required to submit the budget with the first thirty days. If he should introduce it at the beginning of the session, the first month may be taken up with the consideration of his pro-

posals. It is possible that the budget might be disposed of before the recess, thus leaving the recess and the following session to take care of the work of legislation proper. This would be particularly useful if it turned out that the budget required changes in the tax system. The appropriations having been settled first, the exact kind of tax could be determined upon after an investigation to be undertaken during the recess period.

Doubtless other uses for the recess period will be developed. At any rate the more important members of the legislature, those who take their responsibilities seriously, do not look with favor upon any measures to re-establish the continuous session.

## CHAPTER XXI

### THE LEGISLATURE: WORK AND METHODS

#### 134. CONSTITUTIONAL LIMITATIONS ON SPECIAL LEGISLATION

In order to overcome the evils of special legislation, many state constitutions not only prohibit the legislature from passing special laws in cases where a general law can be made applicable, but also contain a lengthy list of subjects upon which no special law shall be passed. The following section from the Constitution of Illinois will give an idea of the general character of such provisions.

[*Constitution of Illinois*, Art. IV, sec. 22.]

SECTION 22. The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: for—

- Granting divorces;
- Changing the names of persons or places;
- Laying out, opening, altering and working roads or highways;
- Vacating roads, town plats, streets, alleys and public grounds;
- Locating or changing county seats;
- Regulating county and township affairs;
- Regulating the practice in courts of justice;
- Regulating the jurisdiction and duties of justices of the peace, police magistrates and constables;
- Providing for changes of venue in civil and criminal cases;
- Incorporating cities, towns or villages, or changing or amending the charter of any town, city or village;
- Providing for the election of members of the board of supervisors in townships, incorporated towns or cities;
- Summoning and impaneling grand or petit juries;
- Providing for the management of common schools;
- Regulating the rate of interest on money;
- The opening and conducting of any election, or designating the place of voting;
- The sale or mortgage of real estate belonging to minors or others under disability;
- The protection of game or fish;

Chartering or licensing ferries or toll bridges;

Remitting fines, penalties or forfeitures;

Creating, increasing or decreasing fees, percentage or allowances of public officers, during the term for which said officers are elected or appointed;

Changing the law of descent;

Granting to any corporation, association or individual the right to lay down railroad tracks, or amending existing charters for such purpose;

Granting to any corporation, association or individual any special or exclusive privilege, immunity, or franchise whatever.

In all other cases where a general law can be made applicable, no special law shall be enacted.

### 135. LEGISLATIVE PROCEDURE IN MASSACHUSETTS

Although the Massachusetts legislature or general court, as it is called, is a conspicuous sinner in the matter of special legislation, it has certain outstanding methods of general procedure, such as public hearings on bills and the joint committee system, which make it well worthy of imitation by other states.

[A. C. Hanford, in *National Municipal Review*, vol. XIII, pp. 40-46 (Jan., 1924).]

What are the reasons for the relative success which the Massachusetts legislature has achieved? The answer to this question is to be found in the absence of any limitation upon the length of the session; the joint committee system; the custom that every proposed bill should be given a public hearing before a committee; the rule in regard to the date for introducing measures; the rules requiring not only that all measures be reported out of committee but that such reports shall be made before a certain date; the absence of committees highly privileged under the rules; the leadership of the speaker and president of the senate; the governor's influence upon legislation; the recent budget system; the wide use of unpaid special commissions to investigate and report on proposed legislation of importance; and the central location of the state capital.

All of the standing committees except those on ways and means, judiciary and the procedural committees on rules, engrossed bills, bills in the third reading and the house committees on elections and pay roll are joint committees. For certain purposes the separate committees on rules meet jointly, the committees on judiciary almost always meet jointly, and since 1920 by special



arrangement the house and senate committees on ways and means have held joint sessions on the budget so that practically all the work is by joint committees. The committees consist usually of three or four members from the senate and eight or eleven from the house and a senator is always chairman. A member from the house is selected as clerk of the committee thus eliminating the expense and political abuse involved in employing paid secretaries for such work. This method of providing for committee clerks has also been highly satisfactory from the point of view of efficiency because there is an incentive on the part of the clerk to handle the affairs of his committee in a thorough and business-like manner in order to obtain important committee appointments and possibly a chairmanship in the future.

After consideration by a joint committee bills are reported to either branch, except money bills which are always reported to the lower house, an attempt being made to secure an equal distribution of business between the two houses. If passed the bill goes directly on the calendar of the other house without a second committee stage. The joint committee system saves time and effort on the part of the members of the legislature and also that of the citizens who oppose or favor a measure; it makes possible a more careful and thorough consideration of measures; gives the less experienced members of the house the benefit of the advice and suggestions from the older members of the senate; avoids shifting of responsibility and tends to reduce friction between the houses thus securing some of the advantages of a unicameral system without any of its defects. In other states there seems to be a somewhat fanciful objection to the joint committee system on the ground that the larger number of representatives could outvote the senators and that trouble would arise over assigning the chairmanship to a senator, but in Massachusetts this has caused no difficulty and there is not a trace of friction.

There are at present thirty joint committees. Each senator is on three or four such committees and if he belongs to the majority party, is generally the chairman of at least one. Each representative usually serves on one or two committees and there is a rule that no member shall be required to be chairman of more than one. As in all legislative bodies certain committees such as those on ways and means, judiciary, cities, etc., are the most heavily burdened but there is a fairly equitable distribution of business among the other committees, only about nine of which received in 1923 less than twenty-five bills. While there are perhaps a few more committees than necessary the multi-

plicity existing in many states is avoided; members do not find their efforts divided among six to nine different committees as in some other legislative bodies and practically all of the committees are integral parts of the legislative system carrying a fair amount of business.

None of the committees is especially privileged in regard to the control of debate or in the reporting of bills referred to it. The committee on rules in each branch is, however, a rather powerful body. The presiding officer of each house is chairman of his respective committee and the majority floor leader as well as the leading members of the house and senate have seats thereon. To this committee are referred all measures that are introduced after the date set for the filing of bills and the committee reports to its respective house whether or not the rule shall be suspended to allow introduction. Other matters such as orders authorizing committees to travel or to employ stenographers or involving special investigations go to this committee for report. The committees on ways and means and judiciary also have rather large influence due to their importance and because of the fact that they contain among their membership the leaders of the majority party. But these committees do not derive their prestige from rules which give them control over debate or permit them to change the regular order of business.

Custom requires that every bill no matter how trivial or unimportant should be given a public hearing before a committee, the date of which is publicly advertised, through the newspapers and by official bulletins. Oftentimes it is necessary to give more than one hearing on a measure and in fact the more important hearings may extend over several days. The committee hearings are for the most part conducted in an orderly fashion with ample opportunity to both the opponents and proponents to present their arguments. Hearings on measures of importance to the general public or to a large group of citizens are well attended and the proceedings are fully reported by the press of metropolitan Boston. The writer has seen as many as five or six hundred persons at a committee hearing on some important bill, such as proposals for repealing the daylight saving law, increasing the fees on motor vehicles, prohibition enforcement, granting equal pay to men and women teachers, etc. This system produces results that are highly satisfactory. It gives interested parties an opportunity to express their opinions and air their grievances. At the same time the members obtain valuable information on proposed legislation and are able to gauge the ex-

tent of popular demand for measures submitted for their consideration, while the general public is educated through the newspaper accounts. The successful working of this system is undoubtedly due in large measure to the location of the capitol at Boston in the center of a metropolitan area containing about half the population of the state and within easy reach of three-quarters of the people of the commonwealth. Although considerable publicity is given to the hearings, especially the important ones, through the newspapers, it is unfortunate that the committees do not keep official records of such hearings nor of their executive sessions which are accessible to the public.

Committees not only grant a public hearing on each measure but the joint rules require that every bill shall be reported to the whole house on or before the second Wednesday in March which may be and usually is extended to the second Wednesday in April. Upon the expiration of this period all measures in possession of a committee must be reported within three days. This report must recommend that such bills be referred to the "next General Court," which means that the measure goes over to the next session when it may be taken from the files by any member. This report is used in cases where the committee is unable or does not wish to reach agreement. But at this stage any member may move that the original bill be substituted for the report "reference to the next General Court" and if such a motion receives the required majority the measure is brought before the whole house. Every measure must, therefore, be reported by the committee to which it has been referred prior to the last month or two of the session either favorably, adversely, or by "reference to the next General Court." Committees are thus kept from pigeonholing measures in such a manner that they never see the light of day, while the rule requiring report before a certain date avoids the last-minute rush which is common in many legislative bodies at the close of the session. The rule requiring a report on all measures of course lengthens the sessions, but it has the advantage of getting all business before the legislature in time to dispose of it in an orderly fashion.

Measures reported out of committee go on the calendar of either branch, except money bills which are reported to the house, and are taken up in a specified order which cannot be set aside except by unanimous consent or a special majority and which must be completed as noted above before the expiration of the session. It is the practice of the present speaker to lay before the members of the house each week information showing

the number of bills referred to each committee, the number reported by each to date, and the number still in committee as compared with the status at the same period in previous years. Recently this data has appeared weekly in the house journal. This practice keeps the members informed as to the progress of legislation and has been responsible for producing competition among the committees to finish their work as speedily as possible. Another helpful feature is the weekly publication of a "Bulletin of Committee Work and Business," which shows the committee to which each measure has been referred, the date set for hearings, the committee report, the action by each branch, and the action of the governor. This bulletin is not only furnished to the legislators but is issued for general distribution. In this way the members of the legislature and the public are furnished with accurate, carefully arranged and easily understandable information concerning the status of any measure. A daily list is also published showing the committee hearings each day as well as a calendar for each house setting forth the business which will come before it during the day.

The procedure is thus arranged in such a manner as to make possible a careful consideration of every measure by a joint committee; to provide for ample publicity; the reporting of all bills to at least one house which then go through a regular order which cannot be changed except by a special majority, and the forcing of legislation step by step. Such a procedure, of course, makes it necessary for the legislature to remain in session from five to six months each year which has certain disadvantages as well as merits. It is clear, therefore, that the Massachusetts system is not adapted to states where the session is definitely limited in the constitution.

Besides the unlimited duration of the session, and the rules of procedure, there is another requirement which assists the legislature in conducting its business in an orderly fashion. The rules provide that practically all proposals for legislation must be introduced on or before the second Saturday of the session. Petitions or bills coming in after that time go to the "next General Court" unless the rule is suspended by a four-fifths vote of each branch. The only exceptions to this rule are reports from the state departments, commissions or special committees appointed to investigate various matters or legislation based upon recommendations in the governor's message, which may be introduced at any time. As a matter of fact the rule is suspended when such action is regarded as desirable, but it has a

very decided advantage in that, with these exceptions, measures do not come straggling in all during the sessions; the leaders and committees know early in the session what is before them and can plan accordingly. In 1922 and in 1923 the work of the legislature was still further assisted by a requirement that state officers, heads of departments, and also certain commissions which were authorized to make investigations during the recess should file copies of their proposed bills early in December, the month before the legislature convenes. The present speaker has recently sent requests to members of the legislature urging them to submit as many of their proposed bills as possible prior to the opening of the 1924 session. An attempt is thus being made to get bills filed even prior to the date fixed by the rules, so as to have them printed and distributed in order that the committees may commence work at once instead of marking time for several weeks.

At the present time the legislature consists of 160 Republicans and 80 Democrats in the house and 33 Republicans and 7 Democrats in the senate, thus giving the Republican party a large majority in both branches although a somewhat smaller majority than in 1921 and 1922, when the Democrats had only five members in the senate and about 50 in the house. Partisanship, however, plays a small part in the legislature and an examination of the journal for the last few sessions fails to show a single instance of a strict party alignment on any measure. Also the legislature is not under the domination of the state organization of either party. As expressed by a competent observer and one who was for a long time a member of that body: "It especially resents anything savoring of dictation by party leaders outside the chamber. Few things would more hurt the chances of a bill than to let it be known that it was urged by the state committee of the majority party." At the same time there is most effective and able leadership among the majority party in both houses and the Republican party assumes credit if not responsibility for the showing of the legislature.

The principal leaders of the house are the speaker, the floor leader who serves on the rules committee, the chairman of the committee on ways and means, the chairman of the committee on judiciary, and a half-dozen others who gain prominence because of their ability and personality. The floor leader is placed in front of the speaker so that he may be promptly recognized by him, while the chairmen of the committees on ways and means and judiciary have especially assigned seats. In the senate, with

only forty members, there has not been the same need for highly developed leadership, but the president of that body and the floor leader have been largely responsible for the direction of legislation. The leadership of these officers has been effective and the positions have been held by men of unusual ability and with a broad interest in improving the substance of legislation and legislative procedure. The list includes within recent years such names as President Coolidge, who was at one time president of the senate; the present governor, Channing Cox, who served first as chairman of the judiciary committee and later as speaker; Louis A. Frothingham, now a member of Congress, and author of *The Constitution and Government of Massachusetts*, and the present speaker, Benjamin Loring Young, who has taken a large part in the establishment of the budget system, in the new plan for continuous consolidation of the laws, in bringing about various changes in the rules strengthening legislative procedure, and who has made a scientific study and taken a keen interest in the general improvement of legislative methods and output.

The positions of president of the senate and speaker are eagerly sought for not only as places of power and honor but also because they are regarded as stepping-stones to the office of lieutenant governor, who by tradition has a strong claim on his party's nomination for the governorship. It is perhaps this factor that has furnished the incentive to leadership in the Massachusetts legislature. A presiding officer, a floor leader, or the head of an important committee, if ambitious, knows that his future depends upon his record in the chair and upon the manner in which he conducts his work. As long as a presiding officer cares to serve it is the custom to reelect him but, when a vacancy occurs by retirement or resignation, a brisk contest usually takes place. The various candidates then carry on a campaign after the close of the session prior to the primary and final elections in an attempt to pledge as many of the members or prospective members as possible. If one of the candidates has an extremely strong following the other may retire, but if this is not the case the fight is carried into the party caucus which is called two or three days before the meeting of the legislature.

The chief weakness of the Massachusetts legislative system is the mass of local and special legislation. About half of the actual output of the legislature, and even a larger proportion of the bills introduced, consists of special and local measures authorizing cities and towns to borrow beyond their debt limits;

granting pensions to specified local employees; changing the names of city officers; creating public utility, charitable, and educational corporations; regulating the location of garages in a particular city; authorizing a specified charitable society to acquire property; authorizing a particular city to sell or lease certain land held by it for playground purposes; authorizing the registration of Mary Jones as a chiropodist without examination, etc. Then, too, there are numerous measures regulating the details of administration which should fall within the jurisdiction of some department or commission. . . .

This means that a large part of the time of the legislature is taken up with proposals of purely local significance and with details of an administrative nature at the expense of measures of state-wide interest and large importance. The legislature has attempted to reduce the burden somewhat through the introduction of a budget system, the requirement that all local measures be advertised in the locality affected, and the requirement that petitions for pensions must come from the proper local officials rather than from individuals. Yet the bulk of special legislation is still too great. The remedy would seem to be not in a constitutional prohibition of special legislation but in the adoption of a careful home-rule system for cities and the development of administrative machinery for passing upon requests for special and local legislation.

### 136. JOINT LEGISLATIVE RULES

As has been shown in the preceding selection, one of the distinctive features of the legislative procedure in Massachusetts is the joint committee system. In addition to the separate rules of the two houses, there are also a number of joint rules of the Senate and House of Representatives, which are designed especially to expedite business. The following selection sets forth some of the more important of the Massachusetts joint rules, which are observed in practice with rare fidelity. In other states, notably Illinois, although each house ordinarily adopts separately its set of rules, some of the rules which are identical in both houses may be adopted jointly.

[Massachusetts Joint Rules, in *Manual for the General Court*, 1925-26, pp. 615-633.]

1. Joint standing committees shall be appointed at the beginning of the political year as follows:—

A committee on Constitutional Law;

A committee on Counties;

A committee on Highways and Motor Vehicles;

- A committee on Labor and Industries;
- A committee on Pensions;
- A committee on Public Safety;
- A committee on State House;
- A committee on Water Supply;

Each to consist of three members on the part of the Senate, and eight on the part of the House;

- A committee on Agriculture;
- A committee on Banks and Banking;
- A committee on Cities;
- A committee on Conservation;
- A committee on Education;
- A committee on Election Laws;
- A committee on Harbors and Public Lands;
- A committee on Insurance;
- A committee on Legal Affairs;
- A committee on Mercantile Affairs;
- A committee on Metropolitan Affairs;
- A committee on Military Affairs;
- A committee on Municipal Finance;
- A committee on Power and Light;
- A committee on Public Health;
- A committee on Public Institutions;
- A committee on Public Service;
- A committee on Railroads;
- A committee on State Administration;
- A committee on Street Railways;
- A committee on Taxation;
- A committee on Towns;

Each to consist of four members on the part of the Senate, and eleven on the part of the House.

Matters referred by either the Senate or the House to its committee on the Judiciary or on Ways and Means shall be considered by the respective committees of the two branches, acting as joint committees, when, in the judgment of the chairmen of the respective committees of the two branches, the interests of legislation or the expedition of business will be better served by such joint consideration. Matters may also be referred respectively to the committees on the Judiciary and on Ways and Means, of the two branches, as joint committees.

The committees on Rules, together with the presiding officers of the two branches, acting concurrently, may consider and sug-



gest such measures as shall, in their judgment, tend to facilitate the business of the session. . . .

4. Joint committees may report by bill, resolve, or otherwise, to either branch, at their discretion, having reference to an equal distribution of business between the two branches, except that money bills shall be reported to the House; and except that when a report is made from any committee to either branch, and the subject-matter thereof is subsequently referred therein to a joint committee, such committee shall report its action to the branch in which the original report was made.

5. Reports of joint committees may be recommitted to the same committees at the pleasure of the branch first acting thereon, and bills or resolves may be recommitted in either branch, but no such recommitment shall be made after the fourth Wednesday in March. A concurrent vote shall, however, be necessary for the recommitment of such reports, bills, or resolves, with instructions. After recommitment, report shall, in all cases, be made to the branch originating the recommitment. . . .

10. Joint Committees shall make final report not later than the second Wednesday of March on all matters referred to them previously to the first day of March, and within ten days on all matters referred to them on and after the first day of March; but, except as provided in Rule No. 30, the time within which joint committees are required to report may be extended by concurrent vote. When the time within which such joint committees are required to report has expired, all matters upon which no report has then been made shall, within three legislative days thereafter, be reported by the chairman of the committee on the part of the branch in which they were respectively introduced, with a recommendation of reference to the next annual session under this rule. This rule shall not be rescinded, amended or suspended, except by a concurrent vote of four-fifths of the members of each branch present and voting thereon. . . .

12. Resolutions intended for adoption by both branches of the General Court, and petitions, memorials, bills and resolves introduced on leave, and all other subjects of legislation, except reports required or authorized to be made to the Legislature, deposited with the Clerk of either branch subsequently to five o'clock in the afternoon on the second Saturday of the annual session, shall, when presented, be referred to the next annual session; but this rule shall not apply to petitions in aid of, and remonstrances against, legislation already introduced and pending; nor shall it apply to a petition offered in place of a former one having in

view the same object, upon which, before reference to a committee, leave to withdraw was given because the same was not in proper form, provided that such subsequent petition is deposited with the Clerk of either branch within one week from the day on which leave to withdraw was given; nor shall it apply to a bill or resolve introduced on leave or to a resolution presented subsequently to five o'clock in the afternoon on the second Saturday of the annual session, when such bill, resolve or resolution is based upon the report of a joint committee which has been made in compliance with instructions to report facts or to investigate, provided the said bill, resolve or resolution is introduced within one week after the committee's report is submitted. This rule shall not be rescinded, amended or suspended, except by a concurrent vote of four-fifths of the members of each branch present and voting thereon: *provided, however*, that, except by unanimous consent, it shall not be suspended with reference to a petition for legislation when such petition is not accompanied by a bill or a resolve embodying the legislation requested. . . .

30. All motions or orders extending the time within which joint committees are required to report shall be referred without debate to the committees on Rules of the two branches, acting concurrently, who shall report recommending what action should be taken thereon. No such extension beyond the second Wednesday in April shall be granted, against the recommendation of the committees on Rules of the two branches, acting concurrently, except by a four-fifths vote of the members of each branch present and voting thereon. This rule shall not be rescinded, amended or suspended, except by a concurrent vote of four-fifths of the members of each branch present and voting thereon.

### 137. THE LOBBY

A sinister influence in legislation is the lobby or so-called "third house," consisting of persons employed by special interests to push or kill pending bills. Constitutional provisions, laws, and legislative rules have been adopted in various states in the endeavor to curb this evil, but without a large measure of success. In some cases they undertake to penalize lobbying as a crime, while, in others, publicity is relied upon as the principal means of enforcement. It must not be forgotten that certain kinds of lobbying may be quite legitimate and above-board. It is difficult to define lobbying in a criminal statute so as to exclude legitimate activities. In the first of the following extracts a survey is given of the provisions of existing state laws on the subject, together with some information as to how these laws actually operate in certain typical states. The second selection consists of portions of the Wisconsin anti-lobbying law, which is generally considered to be one of the most successful in this field.

## a. Regulation of Lobbying

[J. K. Pollock, Jr., in *American Political Science Review*, vol. XXI, pp. 336-341 (May, 1927).]

. . . . .

In the last decade, there has been an amazing development of the practice of employing legislative agents to represent special interests during the sessions of legislative bodies. This development has gone on so rapidly that today it is clear to experienced observers that the influence of these organized and well-represented groups is very potent in determining legislation, and in many cases it is even overwhelming and decisive. One writer refers to the lobbyists in Washington as "the third house of Congress." Other observers describe the swarm of lobbyists who attend the sessions of every state legislature. Everywhere it is evident that all substantial interests in a state or in the nation now consider it highly expedient to be represented before legislative bodies by an agent or agents.

The practice is, of course, not particularly new, but never before have legislative bodies been subjected to such a continuous and powerful bombardment from private interests as at present, and never before has the practice of lobbying been carried on with such great resources and with such finesse. Lobbyists were known several generations ago, but they were not numerous and they operated according to the political fashions of their age, that is, quite coarsely and brutally. They had no qualms about buying legislation openly. Lobbyists today, however, although not noted for their angelic purity, operate quite differently from their predecessors—we hope less objectionably.

It is not unnatural that a matter which the private interests of the country consider so important should receive attention from legislative bodies. The limitation and regulation of lobbying is a problem that affects the legislature first of all. The public interests are also involved, but to protect itself and to enable itself to function in a normal way, the legislature should aim to choke off every practice which denies it any of its rightful prerogatives, and which tends to bring it into public disfavor. And, interestingly enough, investigation discloses that legislatures have not ignored the practice of lobbying, but on the contrary have seen fit to bring it within the scope of state regulation.

Indeed, for the most part quite unnoticed, there has been built up a substantial body of statutory law on the subject. At the

present time (1927) there are thirty-two states with laws of one kind or another dealing with lobbying. These laws vary in certain particulars, but in general they follow the same lines. Most of them are rather short, but the better ones are longer and more detailed.

The three provisions of lobbying laws which appear most frequently are, first, the requirement of registration; second, the requirement of filing expense accounts; and third, the prohibition of contingent compensation. Many other provisions of value, however, are found in the laws of a few states. Some states, for instance, pay particular attention to the enforcement provisions, in most cases making the attorney-general responsible for the prosecution of violators. Several states prohibit public officials from acting as lobbyists, or from in any way attempting to influence legislation. The Massachusetts law states that "no member of a state or district political committee shall act as a legislative agent."

Several of the state laws are too brief, and hence inadequate. The Utah law is a case in point. The law of West Virginia merely prohibits lobbying on the floor of either house while the legislature is in session, a regulation which is obviously insufficient. This West Virginia law is probably the weakest of all the state laws on the subject. The California and Montana laws are very deftly worded to prohibit any persons from attempting to influence a member of the legislature "by menace, deceit, or suppression of the truth." This provision, of course, still permits some of the most dangerous lobbying to continue unabated. Several of the state laws have been carefully drawn. Among states possessing the best laws may be mentioned Wisconsin, Indiana, New York, and Ohio. The law of Wisconsin is probably the most stringent of the four.

Along with the question of how many laws there are on the statute books, it is quite as important to ascertain whether or not these laws have been effective in preventing the evils legislated against. The experiences of Ohio, New York, and Wisconsin give us considerable light on this phase of the subject.

In Ohio, where there is a good law, lobbyists have been rather careless about observing its provisions. Furthermore, there has been little or no interest, either in the legislature or outside of it, in holding them to the strict letter of the law. In 1921, one hundred and sixteen lobbyists registered according to the provisions of the law. In 1925, one hundred and ten registered. The interesting fact about the registrations in 1925 is that most

of them were made after the senate had passed a joint resolution asking the secretary of state to inform the legislature how many lobbyists had registered. Another provision of the Ohio law which requires lobbyists to file expense accounts showing the expenditures made to influence legislation has not been of any value; a perusal of the expense accounts which have been filed shows that in every case the lobbyists have said, "received nothing and spent nothing." It can thus be seen that the Ohio law has not been carefully enforced and has not eliminated the evils which accompany unrestricted lobbying.

In New York, where there is a good law on the subject, some of the most flagrant cases of sinister lobbying can be found. Early in the 1927 session a member of the legislature complained that a lobbyist actually stood beside the clerk and checked up to see how the various members voted on a proposition in which he was particularly interested. It is very well known at Albany that lobbyists do practically as they please, ignoring at least the spirit of the lobbying law. From the point of view of wording, the New York law is a good measure, but it has by no means been sufficient to cope with the problems presented by the presence of innumerable lobbyists.

The Wisconsin law, which is one of the most thoroughgoing and stringent in the country, forbidding, as it does, all influencing of members except by means of public testimony or statement, has in general been successful. The attorney-general reports that there have been no prosecutions under the law. It has been complied with very generally and no one attempts to appear before the legislature or to engage in lobbying without registering and complying with the terms of the act. The law seems to be not only a good one, but also effective.

If it were necessary, it could be demonstrated that in other parts of the country the laws on the subject have not worked out as satisfactorily as a reading of them would indicate. The experience, therefore, which the various states have had with lobbying laws hardly indicates that the problem of regulating lobbying has been solved, or is even under reasonable control. The anti-lobbying laws are thus like many other laws which have been placed on the statute books only to be forgotten and never to be enforced.

Of course it is far easier to state the evil than to suggest the remedy. But if legislatures really intend to regulate lobbying in an effective way, they should have no more difficulty with this subject than with a number of others for which they have already

legislated effectively. In any event, the enforcement provisions of the law should be carefully drawn, for the value of the law depends almost entirely upon the effectiveness of its enforcement. Some person must be made responsible for the enforcement of the law, because what is everybody's business is nobody's business.

Furthermore, it might be wise to give some proper official the power to demand under oath, before a measure finally becomes law, a detailed statement concerning the methods used and the money spent on that measure. This provision would make enforcement more effective and would tend to deter improper practices, because of the fear of publicity. Publicity is the weapon which seems most likely to accomplish the defeat of all activities inimical to the public interest. Consequently, whatever will bring lobbying out into the open, or will throw the light of publicity upon it, should be attempted.

It is also a matter of importance to indicate properly what is meant by the term "lobbyist." It is an essential part of any good statute, whenever there is the least doubt, to define the terms included in it, and since there is considerable difference of opinion about the term "lobbyist," a definition is very necessary. Some state laws neglect to do this, and the omission is quite serious, because unless the law definitely states what constitutes lobbying, all those who attempt to influence legislation will claim that they do not come within the terms of the act—that someone else was intended. The law thus becomes useless and soon is relegated to the legislative scrap heap. Consequently, a careful definition seems necessary to a good lobbying statute.

Finally, the general provisions regarding registration, filing of expense accounts, and prohibition of contingent compensation should be included in a good law. No law thus far is really effective in regard to filing expense accounts. The trouble is that the expense accounts, if filed at all, are made public too late to affect the legislation for which money may have been expended. It is likely that a period of one week only should be allowed for filing expense accounts after the legislature has adjourned. Thirty days is too long a period, because in most cases it does not even permit the governor to veto a bill, by reason of excessive expenditures in its behalf, in time to count.

Although lobbying flourishes at Washington, Congress has not seen fit to regulate it. Scarcely an important bill passes without some complaint being made that a highly paid lobby has unduly interfered with its enactment. Congress is thus lagging behind the states in the matter of regulating lobbying, even though, as

has been pointed out, the mere existence of a law does not ensure the elimination of all evils connected with the practice. Perhaps, after all, we should agree with the farmer who suggested that the only way to keep track of lobbyists is to require them to wear yellow ties. It is certain that mere legislation has its limits, and until a legislature can be found all the members of which refuse to have any private dealing with the representatives of special interest, it is likely that some of the most sinister forms of lobbying will continue. Few lobbyists, for instance, object to being registered, because this requirement does not prevent them from influencing legislators; and the experienced lobbyist can work effectively even though barred from the floors of the houses. But, even so, a good lobbying law places the legislature in a strong position to protect itself from the assaults of privilege-seeking agents, and tends to penalize those who are trying to live on its favor.

#### b. The Wisconsin Anti-Lobbying Law

[*Wisconsin Statutes, 1925*, vol. I, pp. 2279-2281.]

346.19. Any person who shall, directly or indirectly, give or agree or offer to give any money or property or valuable thing or any security therefor to any person, for the service of such person or of any other person in procuring the passage or defeat of any measure before the legislature or before either house or any committee thereof, upon the contingency or condition of the passage or defeat of such measure, or who shall receive, directly or indirectly, or agree to receive any such money, property, thing of value or security therefor for such service, upon any such contingency or condition, or who, having a pecuniary or other interest, or acting as the agent or attorney of any person in procuring or attempting to procure the passage or defeat of any measure before the legislature or before either house or any committee thereof, shall attempt in any manner to influence any member of such legislature for or against such measure, without first making known to such member the real and true interest he has in such measure, either personally or as such agent or attorney, shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding two hundred dollars.

346.20. Every person, corporation or association which employs any person to act as counsel or agent to promote or oppose in any manner, the passage by the legislature of any legislation affecting the pecuniary interests of any individual, association or

corporation as distinct from those of the whole people of the state, or to act in any manner as a legislative counsel or agent in connection with any such legislation, shall, within one week after the date of such employment, cause the name of the person so employed or agreed to be employed, to be entered upon a legislative docket as hereinafter provided. It shall also be the duty of the person so employed to enter or cause to be entered his name upon such docket. Upon the termination of such employment such fact may be entered opposite the name of any person so employed either by the employer or employee.

346.21. The secretary of state shall prepare and keep two legislative dockets in conformity with the provisions of sections 346.20 to 346.26, one of which shall be known as the docket of the legislative counsel before committees, and the other as the docket of legislative agents. . . . In such dockets shall be entered the names and business address of the employer, the name, residence and occupation of the person employed, the date of the employment or agreement therefor, the length of time that the employment is to continue, if such time can be determined, and the special subject or subjects of legislation, if any, to which the employment relates. Such dockets shall be public records and open to the inspection of any citizen upon demand at any time during the regular business hours of the secretary of state.

346.22. . . . No person shall be employed as a legislative counsel or agent for a compensation dependent in any manner upon the passage or defeat of any proposed legislation or upon any other contingency connected with the action of the legislature, or of either branch thereof, or of any committee thereof. No person whose name is entered on the docket of the legislative counsel shall render any service as legislative counsel or agent otherwise than by appearing before a committee, . . . or by giving legal advice in the case of regular legal counsel of corporations or associations, unless his name is also entered on the docket of legislative agents.

346.23. Legislative counsel and agents required to have their names entered upon the legislative docket shall file with the secretary of state within ten days after the date of making such entry a written authorization to act as such, signed by the person or corporation employing them.

346.24. Within thirty days after the final adjournment of the legislature every person, corporation or association, whose name appears upon the legislative dockets of the session, shall file with the secretary of state a complete and detailed statement, sworn



to before a notary public or justice of the peace by the person making the same, or in the case of a corporation by its president or treasurer, of all expenses paid or incurred by such person, corporation or association, in connection with the employment of legislative counsel or agents, or in connection with the promoting or opposing in any manner, the passage by the legislature of any legislation coming within the terms of section 346.20. Corporations and individuals within the provisions of sections 346.20 to 346.26 shall render such accounts in such form as shall be prescribed by the secretary of state, and such reports shall be open to public inspection. . . .

346.26. Sections 346.20 to 346.26 shall not apply to any municipality or other public corporation.

346.27. It shall be unlawful for any person employed for a pecuniary consideration, to act as legislative counsel or legislative agent, as defined by sections 346.20 to 346.26, to attempt personally and directly to influence any member of the legislature to vote for or against any measure pending therein, otherwise than by appearing before the regular committees thereof, when in session, or by newspaper publications, or by public addresses, or by written or printed statements, arguments, or briefs, delivered to each member of the legislature; provided, that before delivering such statement, argument, or brief, twenty-five copies thereof shall be first deposited with the secretary of state. No officer, agent, appointee, or employe, in the service of the state of Wisconsin, or of the United States, shall attempt to influence any member of the legislature to vote for or against any measure pending therein, affecting the pecuniary interests of such person, excepting in the manner authorized herein in the case of legislative counsel and legislative agents.

346.28. It shall be unlawful for any person employed for a pecuniary consideration, to act as legislative counsel or legislative agent, as defined by sections 346.20 to 346.26, to go upon the floor of either house of the legislature, reserved for the members thereof, while in session, except upon invitation of such house.

### 138. LEGISLATIVE REFERENCE BUREAUS

Because of the increasingly complicated conditions of modern legislation, it is now widely recognized that there should be maintained at the state capital an expert agency to assist the legislature in drafting bills and collecting information needed in the work of legislation. The vicissitudes through which these agencies have gone and their present status are described in the following selection.

[J. H. Leek, "The Legislative Reference Bureau in Recent Years," *American Political Science Review*, vol. XX, pp. 823-831 (Nov., 1926).]

The legislative reference bureau has come to be so much an accepted part of governmental machinery that it is no longer the object of praise and attack that it was a few years ago. Like so many other structural reforms in government that were at first hailed as harbingers of the millenium or condemned as destructive or subversive factors, depending on the viewpoint of the commentator, the legislative reference bureau has realized neither the extravagant claims of its advocates nor the dire prophecies of its detractors.

It is worthy of note, however, that there are very few instances where states, having once committed themselves to a whole-hearted experiment in legislative reference work, have abolished their bureaus. There are numerous cases, of course, where the legislature has skimped the bureau on funds and thus curtailed its work, but this is almost the normal experience of many governmental institutions of proved worth. At the present time, almost everybody in any way connected with or conversant with the work of the state government will admit that a legislative reference bureau meets a real need and performs a valuable service. This does not mean, of course, that there is complete agreement as to the exact functions which the bureau shall perform, or as to the way in which it shall carry on its work. There remains a considerable difference of opinion on these matters.

At the present time, probably three-fourths of the states make provision for legislative reference work in some form or other, while it is likely that in the remaining states such functions are performed in such fashion as existing institutions find possible in the absence of *ad hoc* appropriations and facilities. Numerically there has been practically no expansion in the field of legislative reference work in the past ten years. A few additional functions have, however, been put to test in existing bureaus, and several states have experimented with various forms of administration and control. There have been, too, several noteworthy upheavals threatening the continued existence of bureaus. Such matters as these, indeed, comprise the only developments of note in legislative reference work during the past ten years.

Speaking broadly, it may be said that the general scope and nature of legislative reference work became pretty well fixed by 1916, and there have therefore not been any wide departures or notable extensions in the work during the intervening period.

Some additions to the tasks allotted to the bureaus, however, and some variations in the accepted methods of carrying on recognized functions may be worth noting. To the customary function of keeping a card catalogue of bills introduced in the legislature and a record of their status to date, the Connecticut library adds an interesting variation in its practice of making photostat copies of all bills introduced. The reason for this particular practice is the rule of the legislature that no bill shall be printed until it is favorably reported by a committee. A number of bureaus, for instance that of Illinois, have undertaken the task of preparing a periodical bulletin (the Illinois statement appears on the desk of the legislators every week) giving a brief of every bill introduced, together with a statement as to its progress and disposal up to the time of printing. The Virginia bureau goes a bit further in that it prepares, after the legislative session has ended, a lengthy commentary on the legislation passed during the session and its relation to the pre-existing statute law of the state. The pamphlet issued in 1921 covered over one hundred pages. It represents work undertaken, over and above the functions assigned by law, in a gratuitous attempt to extend the usefulness of the service.

One activity which, it would seem, might normally go with the work of a legislative reference bureau is that of codification and consolidation of the statute laws. Of course, very few states are committed to a policy of codification. Nevertheless every state ought to make some provision for a periodic consolidation of its laws, in order that its statutes may not be in such a state of confusion as to be incomprehensible. Thus far only very few states have put such a function on their bureaus. The Pennsylvania bureau is a notable exception, it being specifically directed by a statute of 1923 to undertake such work of that nature as the legislature may designate. The bureau has already issued several codes, the work being carried on in the interim between sessions of the legislature. Under a recent (1925) Indiana statute, the director of the bureau is made *ex officio* revisor of statutes, and is a "member of every commission which may be appointed by the governor or by virtue of any law to codify or revise any statute." But such work, to be carried on between sessions, is not to be undertaken except upon express authorization of the governor or the legislature. It is interesting to note that Wisconsin, which has made perhaps the most intensive use of its bureau of any state in the Union, provides a separate official, known as the revisor of statutes, not connected with the bureau,

for the work of consolidating the statutes and bringing them up to date. Wisconsin is the only state in the Union, incidentally, that adheres to the practice of issuing a complete codification of its laws after every session of the legislature.

Massachusetts has of late undertaken one of the most unique and interesting experiments along this line. For the past five years the state has maintained a system of continuous consolidation whereby, although no definite codification such as that of Wisconsin is made, the laws are kept up to date and classified in such a way that one can easily find the whole body of law upon a given subject. The work is carried on under statute of 1920, which provided for permanent counsel to the House and Senate who should "annually prepare a table of changes in the general statutes, an index to the acts and resolves, and shall from time to time . . . consolidate and incorporate in the General Laws all new general statutes . . . shall so far as possible draft all bills proposed for legislation as general statutes in the form of amendments of or corrections in the General Laws . . . may from time to time submit to the General Court such proposed changes or corrections in the General Statutes as they deem necessary or advisable. . . ." In connection with this scheme a loose-leaf method of binding the laws is used, so that new legislation can immediately be inserted in its proper place, and its relation to the pre-existing laws on the same subject becomes immediately evident.

During the past several years the bureaus have in various instances played important parts in connection with constitutional conventions. In some cases, for instance the Illinois constitutional convention of 1919-20, the bureau was specifically directed by law to compile data of interest to the members of the convention, and a special appropriation was made to cover the work. A series of voluminous publications bearing on the diverse problems of state government, prepared by various authorities under the direction of the legislative reference bureau, was subsequently issued. The Pennsylvania bureau gathered a considerable amount of material in connection with the constitutional revision convention of 1921; while the New York and Nebraska bureaus also have aided conventions in their respective states. In some instances much valuable work of this sort has been done by bureaus without any specific direction from the legislature, and without any additional funds.

Perhaps the most lengthy and detailed list of duties assigned to any bureau is found in the Indiana law of 1925, which re-

organizes the reference agency and incidentally renames it the "legislative bureau." In addition to the stock functions of reference library work and bill-drafting, the Indiana bureau is directed to compile statistical information of all sorts, and to edit the State Year Book; the director is ex officio revisor of statutes; the bureau is made the repository of all bills, resolutions, and documents introduced in the legislature, is assigned the task of printing and editing the House and Senate journals, and is directed to assist the secretary of state in preparing and indexing the acts passed by the Assembly.

There has been more experimentation in matters pertaining to control and administration of legislative reference bureaus than in the functions entrusted to them. The reason for such instability will be considered after several of the changes have been briefly set forth. Bureaus normally are placed under the appointing power of the governor, or of the legislature, or of some supposedly non-partisan body such as a library board; and in most cases there is no change from the type of control first chosen. A few states, however, have made such changes. . . .

In several instances these surface changes are an indication of deep-seated difficulties which, although not much is said about them, are perhaps to date the most stubborn obstacle to the successful carrying out of legislative reference functions. Some bureaus have been accused of political bias; others have been charged with trying to influence legislation. But almost everywhere the bureau finds it difficult to avoid being embroiled, sometimes openly, in contests between governor and legislature; hence the importance of this matter of control. Despite the tendency of political parties to bridge the gap between legislative and executive, the antiquated theory of checks and balances continues to work only too successfully. Only comparatively rarely does a governor manage to keep on good terms with his legislature, even though both are of the same party; while frequently an open feud exists between them.

If, under such circumstances as these, the legislative reference bureau is controlled by the legislature, it is distrusted by the governor; whereas if it is in the power of the governor, that section of the legislature which is opposed to the governor will be suspicious of the bureau and will refuse to make use of it. Sometimes a bureau is able to show a remarkable record of activity so far as the number of bills drafted is concerned, while the actual effect of its work on the statute law of the state is slight, the reason being that the administration bills are not entrusted to it at all.

Where such conditions exist the respective parties to the dispute will find other agencies to draft their bills, such, for instance, as the attorney-general's office, or highly skilled private individuals. It may be objected that bill-drafting is a purely technical function in which personal bias cannot play a part. But the ease and innocence with which a joker can be slipped into an important bill has been demonstrated too often, and sponsors of bills do not care to take chances. Perhaps this difficulty can be obviated in part by placing the work of the bureau under the control of some non-partisan board, but even here the control, indirect and remote though it may be, will rest predominantly with the governor or with the legislature. No remedy for such a state of affairs has thus far been suggested except the provision of separate facilities for bill-drafting. The conditions seem to be inherent in our type of government, and therefore ineradicable as long as the type remains unchanged.

In three or four states legislative reference work has been completely discontinued, but no such calamity has befallen any state which had a thoroughly established and efficiently functioning bureau. . . .

With the lapse of time and the accumulation of experience, the legislative reference bureau has come to fill a recognized place in state government, with fairly definite and circumscribed functions. Presumably its first period of growth and expansion is over. It has not brought about any revolutionary change in the quality of state government, but it was not to be expected that it would do so. On the other hand, many students of government and legislation agree that in such states as Wisconsin and Indiana, where bureaus have been especially active and efficient, there has been a marked improvement in the quality and arrangement of the statute law.

In general, the tendency has been rather toward a narrowing than an extension of function. Whenever the bureau has gone beyond the strict bounds of its work, and has attempted, however laudably from the standpoint of reformers and students of government, to aid in bringing about certain reforms, trouble has resulted. Too often in such circumstances the bureau has come to be looked upon as the tool of a certain faction in the government, and the ultimate result of its well-intentioned efforts has been a curtailment of its usefulness. Apparently the moral is that the bureau should stick strictly to its knitting, and not allow its personal convictions to play the slightest part in the carrying out of its functions. In other words, its function is purely ministerial,

not discretionary. Such an attitude has been carefully fostered and built up over a long period of years in the office of the British Parliamentary Counsel to the Treasury, and it would seem that we are approximating it in the United States.

Of all the elaborate plans for expanding legislative reference service which have been enthusiastically set forth from time to time, practically none has been brought to fruition. Senator Owen's scheme for building up a very extensive legislative reference service for the national government, to be connected with a graduate school of government and legislation, seems to be farther from fulfillment than when it was first broached. Nor does it seem likely that any state will in the near future attempt the plan suggested by John A. Lapp—a variation upon that first set forth by John Stuart Mill in his *Representative Government*—namely, the entire withdrawal of the law-drafting function from the legislature, leaving that body only the alternative of accepting or rejecting bills drawn by a commission of experts. Even the much less drastic proposal of submitting all bills to the legislative reference bureau for technical revision and suggestion has been accepted only in very few American states, notably Connecticut and Vermont.

The inception and early development of the legislative reference bureau belong to the first decade of the twentieth century—a time of progressivism and hopeful experimentation in matters governmental. At present we are going through a period of disillusionment and conservatism, and proposed experiments are viewed with disfavor. Probably in a few years, when the wheel has turned full circle, we will have another era of experimentation, and we may then have an opportunity to test these larger plans. Meanwhile, the legislative reference bureau is carrying out its routine work of library reference and bill-drafting, and there are few who advocate its discontinuance.

### 139. PROBLEMS OF LEGISLATIVE ORGANIZATION AND WORK

The following article contains a survey of the problems, both practical and fundamental, of the organization and work of the legislature. It was prepared for the use of the Illinois Constitutional Convention of 1920-1922, and has special reference to conditions in that state. For the most part, however, it applies equally well to the states generally.

[*Illinois Constitutional Convention Bulletins*, 1920, pp. 588-597.]

A state legislature is essentially the affirmative organ of the state government for the development of new policies, or for the

establishment of new principles. The executive has little or no authority to establish new policies, and the courts have less power to do so. The legislature, as the organ of the state government for affirmative action, should of course be so organized that it may operate effectively for this purpose.

During certain periods in the development of English law, legislative action was perhaps the most decisive influence in the development of the principles of private law. However, on the whole, the English legal system has in its main lines developed as a result of judicial action, and the legislature has normally limited itself to the meeting of new problems which could not be satisfactorily handled by the courts, or to the problem of restating in statutory form the results of judicial action. Occasionally important acts, such as the negotiable instruments act, the uniform sales act, and the uniform partnership act, are enacted by the General Assembly summing up and seeking to codify the existing law, with such changes as may seem desirable. Such an effort at legislative restatement of the whole law upon a particular subject is not frequent; and within the field of private law a session of the Illinois General Assembly ordinarily deals with only a small number of problems in which some specific difficulty may have presented itself.

The work of the Illinois General Assembly may, therefore, be said not to relate primarily to the development of rules for the regulation of relations between private individuals. Sir Courtney Ilbert remarked some time ago of the English Parliament that not one-tenth of the work of a session related to matters of private rights, and that the remainder related to matters primarily administrative in character. The same statement may be made regarding the work of the Illinois General Assembly. The great mass of its work relates to matters other than those which have to do with the relations between private individuals. Of course, the appropriations for the support of the state government and legislation regarding the administrative functions of the state and of the local subdivisions of the state are equally as important to the citizen as is legislation regulating the private rights of one citizen as against another. However, legislation which is primarily administrative in character involves problems of a distinctly different sort from that with respect to matters of private right.

An analysis of the legislative work of the General Assembly of Illinois in 1917 and 1919 indicates that of the 338 laws enacted by the General Assembly at its regular session in 1917, only



seventeen can be classed as regulating primarily the private rights of parties among themselves. Of the 429 laws enacted at the regular session of the Illinois General Assembly in 1919 only fourteen belong to this class. A table is given below indicating in a rough fashion the types of matters dealt with by legislation in Illinois at these two sessions:

	1917	1919
State appropriations .....	63	67
Laws relating to state administrative matters.....	150	177
Laws relating to local administrative matters.....	108	171
Laws relating to purely private rights .....	17	14

Acts containing new substantive matter of legislation and merely containing appropriations incident thereto are not classified as appropriation acts. It is difficult to make a distinction between state and local administrative matters, and doubts have been resolved in favor of classification as local matters. The numerous acts readjusting local tax rates in 1919 are responsible for the large proportion of laws for that year classified as relating to local administrative matters.

This table probably indicates with sufficient clearness that the problems of legislation are primarily problems connected with the operation of state and local governments, and not problems having to do primarily with the rights of private individuals among themselves. In the case of state appropriations and of substantially all legislation regarding state administration, the information upon which legislation is to be based must be obtained primarily from the existing executive governmental agencies of the state, and with a better organization of the executive government the information for such legislation will be much more easily available than at the present time.

For matters relating to local administration, information again must to a great extent come from the state executive offices which have a general supervision over the different functions of local government. For example, with respect to schools and with respect to local charitable administration, a good deal of the impulse for legislation may come from the local communities, but this centers largely upon the state executive offices having supervision over these matters. Comment is made later in this discussion upon the fact that there is no constitutionally recognized relationship between the General Assembly and the executive department with respect to the enactment of legislation, although perhaps fully nine-tenths of the work of the General Assembly at each of its sessions must be devoted to legislation or

proposed legislation having to do with the administration of government.

The chief problems of legislation coming before the General Assembly are problems of a technical character, requiring information regarding the actual operation of government and regarding the operation of similar institutions elsewhere. Legislation is a technical expert task and in the states of this country it is performed by a body, the length of whose session is in most cases narrowly limited. In Illinois where there is no constitutional limit, the General Assembly meets for five or six months in each two years, and the members during that five or six months' period return home ordinarily at the end of each week.

The executive veto operates as a purely negative check, and even as a negative check is exercised in the main in such manner that defects in proposed legislation detected by the governor cannot be corrected by the General Assembly. As has already been suggested, substantially all the bills come to the governor at the end of the session, and his action upon these bills is reported to the legislative bodies which have met merely in a formal manner and ordinarily without a quorum.

The whole development in the states of this country has been that of throwing limitations around the performance of legislative function, and of reducing the periods within which the legislature may act. Attention has already been called to the fact that annual sessions of legislatures have almost ceased in this country and also to the fact that legislative sessions are in most states limited to a fairly brief period. No limitations upon the legislative session exist in Illinois, and normally the General Assembly sits from January until close to the first of July, taking a recess a sufficient time before that date for the governor to act upon bills, and for laws to come into effect on the first of July, as now required by the constitution. Legislative bodies have not only been restricted in the frequency and length of their sessions, but their power has also been limited in this and other states by the development of the executive veto. The function of legislation is the affirmative task of laying down new policies and the executive veto has come to be primarily a negative check.

Detailed limitations as to its procedure and as to the things which it may do have been placed around the legislature in such a manner that pitfalls exist in substantially every direction. Even the most carefully drafted legislation may have overlooked some one of the pitfalls which has been planned by the constitution, and even if such pitfalls have all been carefully avoided there is

great danger of violating some constitutional provision as to procedure in the numerous steps of its cumbersome legislative process through which every bill must pass before it becomes law. Legislation has therefore become a hazardous occupation.

Distrust of legislatures developed very early after the independence of this country, and that distrust has led to a hampering of the legislative function in so many respects that effective and valid legislation has become an extremely difficult thing. Little has been done as yet in this country toward the working out of plans by which the General Assembly may be made a responsible legislative body for the affirmative enactment of state policies. Substantially all the development has been toward limiting and restricting the General Assembly's power for evil, upon the apparent assumption that a legislative body is merely a necessary evil. Naturally little has been accomplished under this theory in the bettering of legislative organization.

The legislative body under the constitution of Illinois is and can be in no sense a body of lawmaking experts. Members of the General Assembly are elected from all walks of life for the purpose of giving ordinarily not over six months out of each two years of their time to the business of legislation. They may well represent under the plans now in existence the sentiment of the community with respect to broad matters of public policy, but such broad matters are rather infrequent as compared with the more detailed and more technical matters which must be dealt with by legislation.

The principle of the separation of powers is formally embodied in the constitution of Illinois, but is expressly subject to all of the exceptions made in the text of the constitution itself. This principle was announced in the constitution of 1818, but the constitution of that year did little toward establishing the principle in practice. From 1818 to 1848, the legislative department was predominant and largely controlled the executive and judicial departments. Such a predominance of the legislative department characterized all state governments after the declaration of independence, and independent spheres of executive and judicial departments gradually became established in the fifty years following 1776. The increased power of the executive and judicial departments has come about primarily through the vesting in these departments of power at first regarded as legislative.

In a discussion earlier in this pamphlet upon the relations of the General Assembly with other departments of the state gov-

ernment, attention has been called to the express constitutional provisions bearing upon relationships with other departments. A number of exceptions have already been made to the principle of the separation of powers and perhaps the greatest exception to this principle in actual operation is that as to the relationship between the governor and the two houses of the General Assembly, when the executive and legislative branches of the state government are in accord. Much the greater part of legislative business bears upon the operation of government and it is essential that the executive and the legislative departments should work in close harmony upon these problems, for the executive is not only the body which will know most about the operation of existing laws (which it is itself administering) but it is also the body which will administer or supervise the administration of all new administrative legislation. It is essential that the General Assembly obtain from the executive department a large mass of information upon which new legislation may be based, and when the governor and the two houses of the General Assembly are in accord it is also natural that the governor as the head of the executive department should have a large influence with the legislative department in the final determination as to what legislation shall be enacted. Such an affirmative relationship between the governor and the General Assembly is now recognized by Article V, Section 7 of the constitution. The governor is required to give the General Assembly information as to the condition of the state and to recommend such measures as he shall deem expedient.

The theory that the governor and the legislature must be absolutely distinct and must operate in more or less separate and water-tight compartments, carefully refraining from relationship with each other, is absolutely unworkable; and such a theory has never been a necessary conclusion from the principle of the separation of powers; nor has it ever been an actuality except in cases where through disagreement between the two departments, the state government was working inefficiently.

There has been in recent years a very definite tendency to recognize in the governor a more positive share in the actual making of legislation. A vigorous man in the office of governor always exercises a large influence in legislation, and the state is better off for such exercise. Bills sponsored by the governor ordinarily obtain precedence in the two houses. Not only this, but the legislative body is more effective under such conditions

and is better able to perform the functions for which it has been established.

The veto power, it has already been suggested, is primarily a negative function exercised at the end of a legislative session, when any suggestions which the governor may have for the improvement of legislation cannot be availed of. Constitutional provisions in Alabama and Virginia and a recent constitutional provision in Massachusetts regarding the governor's recommendations upon bills presented to him after passage by the two houses, indicate a step in the direction of giving the governor a larger affirmative share in legislation; but the governor cannot exercise an affirmative share in legislation by passing upon bills submitted to him, if the bills come to him at the end of the legislative session, so that he has merely an alternative of approving the bill or of vetoing it, without there being a possibility of improving it in co-operation with the General Assembly. The budget provisions in Maryland and Massachusetts also reflect a growing tendency to increase the affirmative share of the governor in legislation, and here this affirmative share in legislation comes through the recommendation of a detailed budget. In Maryland the governor's budget is preserved through a prohibition of legislative increase in its items (a prohibition similar to that established by rules in the British House of Commons). In Massachusetts the governor's control is established by permitting the general court to increase items in the budget, but by granting to the governor at the same time an authority to reduce items or veto parts of items, so that he may, if the general court has increased his recommendations of appropriations, reduce them to the amounts of his original recommendation.

However, little has on the whole been done in this country toward bringing about an effective co-operation between the executive department and the legislative department in matters of legislation. It may be desirable to repeat here that the need for a constitutional recognition of such closer relationship depends upon two things:

- (1) The fact that the bulk of work to be performed by a legislative body has a direct bearing upon the work being done by the executive body.

- (2) The further fact that the legislative body now is and is likely to remain a body not in constant session, but meeting only for several months in each legislative period. A body assembled as is the general assembly of Illinois has no opportunity when once it has come into session to accumulate all of the data neces-

sary for effective legislation. Such accumulation of data and preparation of information must come in advance of the legislative session. The general assembly meets on an average of about three days each week for some six months during each twenty-four months, and the members in general find it necessary to continue their private business to some extent even during sessions. To expect from a body of this type, no matter how able, honest and hardworking the members of such a body may be, a high grade performance upon a great number of technical measures is futile, unless the executive as the permanent organ of the state government has some machinery for bringing these matters effectively to the attention of the legislative body. By the constitution of 1870, an effort was made to draw the courts in as an aid to legislation, by requiring them to report defects in the laws, but this plan has not worked.

The separation of the legislative and executive functions is now accentuated by the provisions in Sections 3 and 15 of Article IV of the constitution, preventing any person elected to the general assembly from receiving any civil appointment in this state during the term for which he shall have been elected, and forbidding any person holding a lucrative office under the United States or this state from having a seat in the general assembly. These provisions do not prevent the giving of political rewards to legislative leaders. If the party in control of the state government is also in control of the national government, appointments to office are oftentimes made to national positions of those who under this constitutional provision would be disqualified from holding state positions. These constitutional provisions do not as a matter of fact prevent the objectionable practice at which they are aimed, but they do often result in taking persons having some information about state government out of the service of state government and into the service of national or local government.

Attention has already been called to the difficulties in the operation of our government when the executive belongs to a political party which does not at the same time control the two houses of the legislative department. This lack of political harmony between the executive and the legislative departments has been quite evident in the national government during a good part of the time since the civil war. In the national government at least there is a tendency for the party in the minority in a presidential election to control the federal house of representatives in the intervening election between presidential years.

In the Illinois general assembly cases of purely partisan alignment upon legislation are not frequent. Upon the bulk of important legislation no party lines are drawn, and in the past at least the issue between "wet" and "dry" has been much more important than that between democrat and republican. However, it should not be inferred from this statement that it is therefore immaterial as to whether the governor and the two houses of the general assembly are in political accord. Although party alignments are infrequent, the control of the two departments of the government by different parties makes a great deal of confusion and friction. Attention may also be called to the fact that, for political reasons, the governor has greater influence with the general assembly meeting when his term begins than with the one meeting in the middle of his term, even though in both cases there is political accord between the governor and the majorities of the two houses.

The English parliamentary system, which has been adopted very widely throughout the world, has a distinct advantage in that it keeps a constant political harmony between the legislature and the executive departments. Under the parliamentary system as it operates in England, and in most of the countries which have copied from England, the executive part of the government is controlled by a cabinet whose members are of the same party as that which controls the more popular branch of the legislature, the members of the cabinet resigning or forcing a new popular election when they cease to be in harmony with the legislative body. In this manner the legislative body is always able to force a change of cabinets or at least an appeal to the electorate to determine whether the existing cabinet and the party it represents should remain in power. Either by the resignation of the cabinet or by its success or failure in the general election, political harmony between the legislature and the executive is restored almost immediately after it has once ceased to exist. The English parliamentary system almost necessarily, however, requires either a single-chambered legislature or a legislative organization in which one house has the dominant political control.

In this country the system of separate executive and legislative organizations works best when the executive and legislature are not only in political harmony but when the personnel of the two departments is such that effective co-operation may be had. When there is not political harmony, or when there is not full co-operation, even if there is apparent political harmony, the gov-

erumental organization in this country works badly or almost not at all. That is, the theory (although somewhat modified by express constitutional provisions) implies a rather distinct separation of departments; but the system based upon this theory works well only when such separation is in fact largely broken down and when a close co-operation is established through extra-constitutional means.

Assuming political harmony to exist at any time between the two departments in a given state, the co-operation of the two departments is of course rendered more effective if the legislative leaders are not changing at frequent intervals. Under our cumbersome system of legislative organization, it normally requires several sessions for a man to develop a close familiarity with the details of governmental problems. The senate in this state is so organized under the constitution that substantially one-half of the members are elected each two years, so that at least one-half of the members have always had previous legislative experience. Of course it is also true that members of the state senate are often re-elected or that members of the house are elected to the state senate, so that continuous legislative service in the senate is increased in this way beyond that required by the constitution. In the session of 1917, of the twenty-five newly elected members of the senate, five had seen service in the immediately preceding session of the house of representatives, and nine had previously been in the state senate. In the session of 1919, of the twenty-six newly elected members of the senate, nineteen had had legislative service immediately preceding their election.

No constitutional provision requires continuity of service in the house of representatives, although by election a fair degree of continuity is maintained. In the Fiftieth General Assembly (1917), of the 153 members, 90 had served in the next preceding session either of the senate or of the house of representatives. In 1919, of the 153 members of the house of representatives, 97 had served in the next preceding session either of the senate or of the house of representatives.

A member by frequent re-elections to the house or senate acquires a degree of expertness in legislative matters, and some continuity of membership through re-election is almost necessary to the working of the present cumbersome machinery of legislation. A house of representatives composed entirely of persons without previous legislative experience would be almost helpless, however high the ability of its members may be.

Anyone who has had to deal with the legislative organization



of Illinois or of any other state must be impressed by the cumbersome of the present legislative machinery. Skill and persistence are required to take a piece of proposed legislation through all stages in each house and finally through the process of executive approval. No plans have been worked out by the constitution or through legislative procedure for the careful coordination of the work of the two houses. The citizen without legislative experience ordinarily finds himself lost when he comes for the first time in contact with this highly cumbersome procedure. The theory upon which this procedure and the limitations upon the legislature have been built up is apparently that the legislature must be practically prevented from doing anything in order that it may be prevented from doing wrong things, and such a plan is practically certain to lead to undesirable consequences.

The process of legislation has two distinct aspects: (1) The expert, (2) the popular. Any legislative organization should be of such a character as to reflect upon matters of legislation the needs and the views of the people of the state. It must also be borne in mind, however, that the technical aspect of legislation is no less important, and that a large part of business to be acted upon by a legislature has to do with matters upon which the public may have very little opinion either way. Even upon matters with respect to which the public has positive views, the technical element is important and care upon the technical side of legislation is essential if the people are finally through legislation to get what they desire. This balancing of the technical and the popular aspects of legislation presents the most serious problem with respect to the matter now under consideration, and the problem is one which has not been dealt with to any extent as yet in this country. From the standpoint of the expression of popular opinion and the accumulation of popular views there is of course a distinct value in having a large popular body meet occasionally as is now the case with the Illinois General Assembly. Small bodies of technical experts holding office permanently or for long terms are not likely to be proper representatives of the popular views and the popular needs.

The functions to be accomplished by a legislative organization are: (1) Satisfactory positive action in accord with the views of the people of the state, and (2) technical correctness in the legislation enacted in accord with popular views and, also in the enactment of the numerous measures needed for the proper conduct of administrative matters with respect to which the public at

large will normally have no decided opinion one way or the other.

This combination of the temporary popular element in legislation with the permanent technical element in legislation may be worked out in several different ways:

(a) The permanent skilled element may be organized in the executive, which has necessarily a permanent, continuous organization, leaving the legislature with an organization more or less like that now in existence for the expression of the popular view upon matters presented by the executive, and also for the enactment into legislation of matters demanded by public sentiment but not proposed by the executive.

(b) There might be a permanent technical legislature such as that suggested in a quotation earlier in this pamphlet from a message to the Kansas legislature by Governor Hodges. Clearly, however, a small permanent body composed of technical experts would not be adequate as a means of reflecting the popular needs and desires in legislation, and if there were a small and permanent technical body such as Governor Hodges suggested, much of the work of such a body would have to be submitted either to a larger and more representative legislative body or to a referendum of the people.

(c) It may be possible to establish a permanent expert staff subject to the general assembly or to a combination of executive and legislative control, this permanent expert staff drawing up the measures suggested by the administrative bodies of the state and local government or by members of the legislature and submitting these measures to the legislature meeting very much as at present. The legislative reference bureau is an approach to what is here suggested, although the chief function of the legislative reference bureau has been that of drafting bills desired by members of the General Assembly, after they have come into session; and there has not as yet been any effective way of preparing in advance of the legislative session the matters which it may be desired to submit to the General Assembly.

## CHAPTER XXII

### THE GOVERNOR

#### 140. SPECIAL MESSAGE OF THE GOVERNOR

At the opening of the regular session of the legislature, which usually meets biennially, it is customary for the governor to present to the legislature, either in the form of a written message or personal address, his recommendations for legislation together with a survey of the condition of affairs in the state. He may also at any time during the session send a special message to the legislature regarding some particular matter. The following selection is an example of such a special message.

[*Illinois Senate Journal*, 1925, p. 389.]

State of Illinois,  
Executive Department,  
Springfield.

*To the Members of the Fifty-fourth General Assembly:*

In compliance with the provisions of an Act approved on March 7, 1917, otherwise known as the Civil Administrative Code of Illinois, I transmit for the consideration of the General Assembly the Fourth State Budget.

This budget embraces the sums which I recommend to be appropriated for the respective code departments, offices and institutions, for use during the two fiscal years beginning July 1, 1925 and ending June 30, 1927. It includes also the estimated revenues from taxation, the estimated revenues from sources other than taxation, and an estimate of the amount required to be raised by taxation.

As required by law, I am transmitting in this budget the estimates of receipts and expenditures received by the Director of Finance from the elective officers in the executive and judicial departments and from the University of Illinois.

Respectfully submitted,

LEN SMALL.

Feb. 4, 1925.

#### 141. CALL FOR A SPECIAL SESSION

The time for the meeting of regular sessions of the legislature is fixed by the state Constitution, but, at other times, the governor may issue a proc-

lamation convening the legislature in extraordinary session. In a considerable number of the states, the legislature is limited at such special session to a consideration of the subjects mentioned in the Governor's call; hence, in his proclamation he usually states the matters upon which he desires legislative action at such session. These may be very few in number or they may be quite numerous, as in the following example.

*[Journal of the Senate of the Second Special Session of the Forty-ninth General Assembly of the State of Illinois, 1916, pp. 1-2.]*

## PROCLAMATION

State of Illinois  
City of Springfield.

Executive Department.

January 7, 1916.

*To the Members of the Forty-ninth General Assembly:*

Whereas, An extraordinary occasion has arisen in the administration of the affairs of the State Government of this State, necessitating an extraordinary session of the General Assembly:

Now, Therefore, I, Edward F. Dunne, Governor of the State of Illinois, do, by virtue of the authority vested in me by section 8, article 5, of the Constitution, convene the Forty-ninth General Assembly to meet in extraordinary session on the eleventh day of January, A. D. 1916, at 12 o'clock, noon, at the State House, in Springfield, Illinois, for the transaction of the following business, viz.:

(1) To enact laws to validate and legalize any and all elections and proceedings for the issuance of bonds for the purpose of constructing, maintaining or repairing, or aiding in the construction, maintenance or repair of roads and bridges, in any and all cases where a majority of the legal voters of any county, township, road district or municipality of this State, voting upon the proposition to issue such bonds, have voted in favor thereof; also to validate and legalize any and all such bonds which have been or may hereafter be issued in pursuance of such elections and proceedings; also to legalize and validate any bonds or obligations so voted for the purpose of obtaining money to be used for, or to aid in, the improvement, in any manner, of any public highways in this State; also to validate and legalize any and all taxes levied, or to be hereafter levied and collected, for the payment of the principal of, and interest on, any and all such bonds.

(2) To enact laws creating a commission which shall be empowered to arrange for and conduct a celebration in honor of the

centennial of the admission of the State of Illinois to the Federal Union, and to make an appropriation therefor.

(3) To enact a law providing for the salary of the Secretary and Chief Examiner of the State Civil Service Commission, and to repeal all laws in conflict therewith.

(4) To enact laws making appropriations to compensate owners of live stock destroyed on account of being affected with or having been exposed to the contagion of foot-and-mouth disease, and to pay the expenses of quarantine and disinfecting premises, and all other expenses incurred in enforcing the law for the eradication of the foot-and-mouth disease among domestic animals.

(5) To enact laws making appropriations to pay the officers, employees, members and other necessary expenses of the second special session of the Forty-ninth General Assembly.

(6) To enact a law making further and additional appropriations for the Illinois Free Employment Offices in Chicago.

(7) To enact a law amending an Act entitled, "An Act to provide for the holding of primary elections by political parties," approved March 9th, 1910, in force July 1, 1910, as subsequently amended by amending section 43 thereof.

(8) To enact a law to govern the sale, distribution and use of anti-hog-cholera serum, hog cholera virus and other biological products within the State.

(9) To enact a law amending an Act entitled, "An Act to provide for the holding of primary elections by political parties for the nomination of members of the General Assembly and the election of Senatorial Committeemen," approved March 9th, 1910, in force July 1, 1910, as subsequently amended.

(10) To enact a law amending an Act entitled "An Act to provide for the election and time of election of judges of the Superior Court of Cook County," approved June 5, 1911, in force July 1, 1911.

(11) To enact a law amending an Act entitled "An Act to provide for the printing and distribution of ballots at public expense and for the nomination of candidates for public offices, to regulate the manner of holding elections, and to enforce the secrecy of the ballot," approved June 22, 1891, in force July 1, 1891, as subsequently amended.

(12) To amend the law passed at the first special session of the Forty-ninth General Assembly authorizing the appointment of a commission to examine into the operation of all pension laws heretofore enacted in this State and to amend the law making ap-

appropriation for said commission or to enact a law creating such a commission and providing an appropriation therefor.

E. F. DUNNE, *Governor*.

By the Governor:

LEWIS G. STEVENSON,  
*Secretary of State.*

## 142. EXERCISE OF THE VETO POWER

The exercise by the governor of his power to veto a bill passed by the two branches of the legislature is considered of such importance that he is usually required by the state constitutions to transmit to the legislature a statement of his objections to the bill. The following is an example of such a reasoned exercise of the veto power.

[*Illinois Senate Journal*, 1925, p. 1391.]

State of Illinois  
Executive Department  
Springfield, June 30, 1925.

*To the Honorable, the Senate:*

I return herewith without my approval Senate Bill No. 477, entitled, "An Act to amend section 11 of 'An Act to regulate the civil service of cities,' approved March 20, 1895, as amended."

I veto and withhold my approval from this bill and state as reasons for my veto the following:

This bill amends the city civil service Act by exempting common laborers and unskilled laborers from the operation of that act.

At present common laborers employed by a city may participate in the pension funds and have the benefit of the pension laws of the city, provided they are under civil service. I am reliably advised that in the City of Chicago several hundred laborers, who are under civil service, have chosen to participate in the pension fund. This amendment would automatically deprive them of their pension rights because the pension fund requires that the pensioner be included within the classified civil service.

It would be manifestly unjust to deprive these several hundred persons and their dependents of their pension rights, to which they have contributed parts of their salaries for many years, by an arbitrary Act of legislation. I therefore veto and withhold my approval from said bill.

Respectfully submitted,

LEN. SMALL, *Governor*.

## 143. THE ITEM VETO AND THE BUDGET SYSTEM

The governor's item veto was introduced into the states prior to the development of the general movement for the budget system. Since the adoption of the latter, the item veto has not become obsolete, but its purposes have undergone a change. In the first of the two following selections, an example of the actual exercise by the governor of his item veto is given, while, in the second selection, the relations between the item veto and the budget system are explained.

## a. Exercise of Item Veto

[*Illinois House Journal*, 1921, pp. 1477-1478.]

State of Illinois,  
Executive Department,  
Springfield, June 30, 1921.

*To the Honorable, the House of Representatives:*

I return herewith House Bill No. 333, entitled, "An Act making appropriations for the University of Illinois and providing for the expenditure thereof."

I veto, and withhold my approval from the following items therein contained:

Page 2, section 1, lines 7 and 8 from the top of the page: "For improvements other than new buildings 320,000."  
Page 2, section 1, line 9 from the top of the page, "For contingencies ..... 320,000."  
Page 3, section 3, lines 3 and 4 from the top of the page: "For first unit of Library building and equipment ..... 500,000."  
Page 3, section 3, line 10 from the top of the page: "For addition to Armory ..... 250,000."  
Page 3, section 3, line 11 from the top of the page: "For Cattle Feeding Plant ..... 50,000."  
Page 3, section 3, line 12 from the top of the page: "For Land ..... 150,000."  
Page 3, section 3, line 13 from the top of the page: "For Contingent Building Fund ..... 50,000."

I submit as reason for my veto of these items the following: The Fifty-first General Assembly appropriated to the University of Illinois the sum of \$5,348,000. The appropriation contained in House Bill No. 333 aggregates \$10,565,000, which is an increase of almost 100 per cent. Even after these items have been vetoed, the increase over the last appropriation is approximately 80 per cent.

In addition to House Bill No. 333, the Fifty-second General Assembly has also appropriated \$100,000, to be received from the Federal Government, and has reappropriated \$185,265. This is a greater increase than has been allowed by the Fifty-second General Assembly to any other division, branch or agency of the State government.

I believe that this increase will be found ample to supply the growing needs of the State university and will provide for as many buildings as the University of Illinois can economically construct before the next session of the Legislature.

Respectfully submitted,

LEN. SMALL, *Governor of Illinois.*

### b. Item Veto and State Budget

[R. H. Wells, "The Item Veto and State Budget Reform," *American Political Science Review*, vol. XVIII, pp. 782-791 (Nov., 1924).]

The movement for budget reform has now reached a point where every state, except Missouri, has enacted some kind of budget legislation. An excellent historical approach to this reform lies in a study of the governor's veto power, particularly his authority to veto items of appropriation. Accordingly, the following article outlines the development of the item veto and indicates its present relation to the budgetary provisions of the states. . . . Originally, the primary purpose of the item negative in the states was to prevent improper or unconstitutional appropriations rather than to restrain expenditures which were merely excessive in amount. This purpose has, in the main, been successfully accomplished. But in time, owing to the increasing cost of government and the extravagant habits of legislatures, the original intent of the item veto has become subordinated to a demand that the governor extensively use his veto authority as a means of compelling the state to live within its income. Under such circumstances, the item veto began to disclose serious defects, the nature of which will be indicated later.

The growing realization of these defects led to reforms along several lines, the most important of which was the state budget movement. Earlier and quite apart from any budgetary legislation, the scope of the item veto was extended in Pennsylvania. Starting in 1885, the governors of that state, without specific constitutional authority, began to reduce items of appropriation with a view to checking improper itemization by the legislature.



Thus, it was no longer possible for that body to prevent the use of the item negative by putting necessary and unnecessary expenditures together in lump-sum items. In 1901, this practice was upheld by the state supreme court and thenceforth was employed on a large scale. . . . The few bills and items which received executive action before adjournment were mainly emergency and deficiency acts. Since a veto after adjournment is not subject to legislative review, it may be affirmed that, under the conditions prevailing up to the passage of the budget act of 1923, the governor of Pennsylvania had an absolute negative over the expenditures of the state. The legislature appropriated recklessly and went home, leaving the executive to make ends meet by whatever reductions he thought proper.

As previously stated, the Pennsylvania plan was evolved prior to any budget reform. Ten or fifteen years ago, it had considerable popularity and many governors and publicists advocated the enlargement of the item veto so as to permit the reduction of items. Moreover, in about a dozen states, besides Pennsylvania, the governors attempted to reduce items or to disapprove parts of items. Their efforts, however, were not very successful because the courts, in the absence of specific constitutional authority, were inclined to hold such action void, and because the item veto, both in its original and modified forms, was rather generally opposed by the new school of budget reformers which was developing about the same time.

It now remains to speak of the state budget movement and of its effect upon the veto power. In lieu of Pennsylvania's modified item negative, the budget advocates presented a counter proposal which found complete expression in the New York budget provision of 1915 (rejected by the voters) and in the Maryland budget amendment of 1916. According to the budget reformers, the veto and the item veto as applied to appropriation bills were illogical and ineffective. They were illogical because they reversed the relation which should exist between the governor and the legislature. Instead of the executive initiating appropriations subject to the revision of the legislative department, which was supposed to control the purse, the opposite situations prevailed. The veto and the item veto were ineffective because responsibility for expenditures was divided. They encouraged extravagance on the part of the law-making branch so that it came to rely upon the governor to make ends meet. Moreover, it was not enough for the executive merely to negative large sums. What was often needed was a general reduction all along the

line, and it was not easy to secure a balanced outlay simply by disapproving a bill or an item here and there. Finally, in many states, the major appropriation acts were generally passed at the end of the session. If executive action on them was required before adjournment, the governor had too little time for careful scrutiny; on the other hand, if he was allowed to negative appropriation measures and items after adjournment, his veto was usually final. It was subject neither to legislative reconsideration nor to adequate public criticism, and it might be used to reward or punish members of the legislature through the approval or disapproval of "pork" projects.

Such criticisms made it increasingly clear that the veto and the item veto, when used alone, were insufficient to cope with the mounting costs of state government. An era of efficiency and economy commissions helped to focus attention on this fact as well as on the need of administrative reorganization. The outcome was a budget reform movement which swept the country and led to the enactment of budgetary legislation in forty-seven states. It is not the purpose of this article to analyze this legislation. The main question now under consideration is, "What has been the effect of the recent movement on the governor's veto power and especially on the item veto?" Obviously, the effect will vary widely in the different states. Nevertheless, the state budget systems may be classified into three groups: those established by legislative act—thirty-one states—which, in form, do not affect the constitutional provisions governing the item veto, but which, in fact, may affect the operation of the item veto; those based on constitutional amendment—Maryland, West Virginia, Nebraska—which specifically curtail the scope of the item veto; and those based on constitutional amendment—Massachusetts, California—which specifically enlarge the scope of the item veto.

The budget systems of the first group may affect the use of the item negative in two ways. If the law requires the governor to prepare the budget, he has a renewed incentive to use his veto authority as a means of defending his proposals against legislative additions. Under such circumstances, it is easy for him to disapprove special appropriation bills initiated by the legislature and new items added by that body. On the other hand, the executive has no direct power to prevent increases in the items originally submitted. The simplest remedy for this difficulty is to enlarge the item veto so as to allow the reduction of items. This step is not objectionable provided it is made an integral

part of an adequate executive budget plan and not, as in Pennsylvania, an isolated and irresponsible instrument of financial control. A second effect of statutory budget systems has been to secure the enactment of the major appropriation measures long enough before adjournment so that any items disapproved therein are subject to legislative reconsideration. Thus, the item veto is made suspensive in fact as well as in theory whereas, too often under the old regime, it was absolute in fact. This speeding-up process is well illustrated by the experience of New York under the budget act of 1916. Before the passage of that act, the item veto was chiefly used after the legislature had adjourned; since then, it has been mainly exercised during the session. From 1899 to 1917, the governors of New York disapproved a total of 121 items before adjournment and 1901 after adjournment; from 1917 to 1924, they negatived 391 items before adjournment and only 7 afterwards. In this connection, it may be noted that, in 1917, 4 items were repassed over the governor's veto, the first time such a thing had ever occurred in that state. A further consequence of the New York budget legislation has been to shorten the time for the executive consideration of items, since the governor has only ten days during the session as opposed to thirty days after adjournment. The result is similar in some of the other states, particularly in those where the legislature must enact the budget bill before any additional appropriation measures are considered.

Turning now to the second group of states, the operation of Maryland's executive budget plan is of chief interest. The Maryland budget amendment of 1916 has the practical effect of taking the item veto from the governor and vesting it in the legislature. Under this amendment, virtually all appropriations are initiated by the governor and presented to the legislature in his budget bill. For the most part the legislature can only strike out or reduce items in that bill. Hence, there is little point in applying the executive veto to the budget act which, therefore, becomes law without further action by the governor. After the final enactment of the budget, the legislature is permitted a narrowly restricted power to pass special appropriation measures for particular purposes, but these are still subject to veto. The results of the Maryland budget system are indeed striking. In the 1918 budget bill, the legislature struck out only two small items and approved the rest as submitted. The general assembly then managed to pass eight insignificant special appropriation acts, of which the governor vetoed one and reduced one. In 1920, the

budget was adopted without change by the legislature which, thereupon, proceeded to enact six other appropriation bills, all of which were negatived. The governor also disapproved 64 highway bills which sought to impose future obligations on the treasury. The general assembly of 1922, a more critical body than its predecessors of 1918 and 1920, struck out 18 items in the budget bill, reduced 93 others, and increased 64 items for judicial salaries. On the other hand, but one act carrying a specific appropriation (\$1500) was passed and this was signed by the governor.

The experience of Maryland during these years shows the effect of a thorough-going executive budget on the veto power. Since the budget bill is the only one likely to contain itemized appropriations, and since the governor may not disapprove it in whole or in part, it follows that the item veto is practically obsolete. However, the veto of special appropriation measures may be used to keep the budget totals from being exceeded and this helps to explain why such measures have been so few in number. Moreover, after the budget is passed, there is little time left for additional legislative appropriations. It is, therefore, apparent, that the veto power in Maryland has become less important as a check upon expenditure. Its chief value now is in preventing the legislature from creating new offices and authorizing new undertakings which, if sanctioned, would necessitate future appropriations.

The enlarged item veto of Pennsylvania and the Maryland executive budget plan are both extreme in the degree to which they permit the governor to control appropriations. Massachusetts and California have sought a more moderate solution of the problem. Under the Massachusetts amendment of 1918, the governor prepares and submits the budget accompanied by a general appropriation bill. Until this bill has been enacted, the legislature is forbidden to pass any special appropriation measures unless recommended by the governor or for purely legislative expenses. On the other hand, the general court has full power to "increase, decrease, add, or omit items in the budget," while the executive is authorized to "disapprove or reduce items or parts of items in any bill appropriating money." The item veto had not existed in Massachusetts before 1918, but, in introducing it as a part of the executive budget machinery, that state unconsciously went back to the original Confederate model, a model which sought to give the executive adequate control over expenditure without too greatly curtailing the power and usefulness of the legislature.

The results of the Massachusetts budget system may now be summarized. From 1919 to 1923 inclusive, no items or parts of items were negatived or reduced by the governor. On the contrary, it was the general court which exercised a veto power over the executive budget estimates. Thus, the legislature struck out 19 items in the 1920 budget, 24 items in the 1921 budget, and 18 items in the 1922 budget. Some items were reduced, others were increased, and a few new items were added against the wishes of the governor who, nevertheless, refrained from disapproving these additions. In every year, the total amount appropriated was less than the total proposed by the executive. In each year, appropriations in addition to those contained in the original budget were made, but these were usually based either upon the supplementary budgets submitted by the governor or upon recommendations in his messages. These supplementary appropriations were enacted in relatively few bills, never exceeding seven per session. No special or private appropriation acts were vetoed by the governor. However, this does not mean that the general court entirely neglected pet schemes. Some of these were incorporated in the general appropriation act or in the supplementary bills, but the governor did not attempt to disapprove them. Others were passed without carrying specific appropriations. At each session, there were a few measures enacted which sought to impose future financial obligations on the state; ten of these were negatived as a means of sustaining the budget proposals. On the whole, the Massachusetts budget system has been a success. The governor has done careful work in revising and reducing the original departmental estimates sent to him. On receiving the budget, the general court has carried the reduction process still further so that there was little occasion to use the veto power on the appropriation bills as they were passed by the two houses. Although the estimates submitted are only tentative and might be altered beyond recognition by the legislature, this has not happened, for that body through its committees has handled the budget in an efficient manner. Were this not the case, the governor probably would have made a more extensive use of his veto power than was done. The mere fact that no items were disapproved or reduced and that no bills carrying specific appropriation were negatived does not prove that the veto prerogative has no place in the budget machinery. Perhaps in the future, there will be a pronounced conflict between the legislature and the executive on the subject of finance. If so, the veto and the item veto will enable the governor to force

the general court to reconsider and to assume full responsibility for any budget changes which it has made.

In view of the results obtained under the several types of budget systems heretofore discussed, what shall be said in conclusion concerning the future of the item veto? It seems clear that both the veto and the item veto should be essential parts of a properly adjusted budget plan such as that existing in Massachusetts. Although the item negative in the states has outgrown its original purpose, it should not be abolished but should be retained and enlarged so as to allow the reduction of items. This, together with the ordinary veto, will afford the governor sufficient means for the protection of his estimates and, at the same time, will make unnecessary such a drastic curtailment of the legislature's power over finance as is found in Maryland. It is desirable that future budget developments in the states should be according to the principles first tried out in the Confederate States and more recently elaborated by the experience of Massachusetts and California.

#### 144. OVERBURDENING THE GOVERNOR AND THE REMEDY

In the first of the following selections the governor of New York gives a graphic account from actual experience of how a governor is overburdened with a host of unnecessary details which consume his time and strength and prevent adequate consideration of large questions of policy. In the second selection a suggestion is made to remedy this situation by making the lieutenant governor a sort of deputy governor to relieve the governor of much of this detailed work.

##### a. Governor Alfred E. Smith, on "How We Ruin Our Governors"

[*National Municipal Review*, vol. X, pp. 277-280 (May, 1921).]

How long would any great corporation live if the man directing its affairs was compelled to spend 75 per cent of his time doing clerical work, signing papers, listening to reports that might well be directed to a competent subordinate? Can you imagine Judge Gary of the Steel Trust, signing three copies of every lease that that corporation makes? Can you imagine him reading over the contract for the removal of ashes from one of the plants? Can you imagine him signing hundreds and hundreds of papers that might well be signed by the attorney of the corporation or by a vice-president or some equally responsible individual?

Theoretically the governor is the head of the government. He is supposed to plan the broad administrative policy. People think that he deals with large affairs. As a matter of fact his energy is consumed by trivial details of a clerical or subordinate nature. There is little time and strength left for the high functions of his office. In addition to the reorganization of administrative departments to give him easy control and supervision over executive affairs, the governor must be relieved from scores of petty duties which demand his attention at serious detriment to his work for the people.

The most annoying duty that is placed upon the governor is his chairmanship of the trustees of public buildings. The capitol and agricultural hall in Albany are directly under the control of the trustees of public buildings, and the law contains a provision that all leases made between the state and the various landlords must be executed by the trustees of public buildings.

The trustees consist of the governor, the lieutenant governor and the speaker of the assembly. It has been the fact for years that these three men come from widely different parts of the state. For the most trivial things the governor must call these men, after the adjournment of the legislature, from their homes to attend meetings for routine business.

The superintendent of the capitol should have some of the power now reposing in the trustees. He should be empowered to dispose of useless furniture and fittings. As the law now stands he cannot dispose of a broken desk or a broken chair (I had to confer over some desks worth \$1.25 each) without the consent of the trustees of public buildings. They have to award all contracts, and before the contract to take the ashes out of the power house can be renewed the trustees must meet and pass upon that solemn proposition.

The state makes hundreds of leases in various cities for branches of the different state departments. Even for the small gas testing station required by the public service commission, the rental of which may be only twenty dollars a month, the governor and other trustees must sign three copies of each lease. Before part payments can be made for contracts for repairs to the capitol the trustees must approve, although the determination of the matter is naturally in control of the state architect.

If a room is to be painted in the capitol or a new strip of carpet is to be laid, there must be a meeting of the trustees, and the work cannot progress until the governor lays aside his other

duties and takes up for consideration the question of a few pots of paint.

The superintendent of buildings is so limited in his authority that he is really the janitor of the building, and seldom makes any important move without seeking the advice of the governor or his secretary, all of which takes considerable time. His powers should be amply extended. He should be given the same authority as other department heads. That would relieve the governor greatly.

The law requires that the governor sign all the parole sheets before men are liberated from the various prisons of the state, even after they have completed the minimum time for which they were sentenced. This is an absolutely useless proceeding. The governor can have no personal knowledge of it, and simply signs the sheets certified to him by the board of parole. They properly should be signed by the superintendent of prisons, he being in possession of all the records. They are brought before the governor, and without any knowledge of his own, and no opportunity of gaining any, he simply goes through the empty formality of signing them. They come with great frequency. Every time the board of parole meets, the lists are brought in. Not only must they be signed by the governor, but they must be attested by the secretary; thus the time of two busy men is taken up in a useless performance, which should be handled entirely by the superintendent of prisons.

In order that police officials appointed by railroad companies may have a state-wide power of arrest, some time ago the law was amended providing for their appointment by the governor. That means that large stacks of certificates of appointment of railroad policemen are laid before the governor for his signature. He does not know the men he appoints, and has to rely upon the railroad as to their integrity and honesty when having conferred upon them by the governor the power of arrest. If such appointments are necessary (which is probable) by some state power, it certainly ought not to be in the hands of the governor. I have spent whole hours at a time writing my name to appointments of railroad policemen. These men should be appointed by the attorney-general who has deputies to assist him in his work. Unfortunately there is no deputy governor.

All applications for notaries public—and there are some 65,000 of them in the state—are sent to the executive chamber, making necessary a whole department in the governor's office for the handling of the applications. This function does not belong



in the executive chamber. It should properly be either in the attorney-general's office or in the office of the secretary of state, where a large part of it might well be performed by deputies.

There is a provision of law which requires the governor to sign all contracts for repairs and betterments in the state hospitals—not only sign the contract, but also the architect's blue-prints. He knows nothing about it and signs them usually upon the recommendation of the state architect. The law ought to be amended so that they be signed by the architect himself, and if there must be any check on the architect, it certainly should be by somebody in a position to know something about it, and not the governor.

The act creating the state constabulary contains a provision that the constabulary are not to exercise their powers in case of strike or riot within the boundaries of an incorporated city without the consent of the governor. This provision operates to make the governor the police commissioner when troops are needed for the suppression of riots inside of cities.

The result of this has been to cause the governor not only annoyance in the daytime, but at night. I was frequently called out of bed at night by the officials of small cities asking for the assistance of the state constabulary. In a great many instances their troubles were imaginary.

I have in mind one particular case where I was called up in the night by one official of the government of a city asking for the constabulary and called up an hour later by another official of the same city advising me not to send them in. That made necessary a conference in the nighttime with the superintendent of the state police and we satisfied everybody by sending the men there in citizens' clothes.

There is another important matter that deserves serious attention, that might be easily remedied. It would require only legislative action, either by amendment to the rules, or if not, by amendment of the legislative law, to prevent the dumping of a large number of bills into the executive chamber, giving the governor only thirty days to consider them.

At the last session of the legislature I had 856 thirty-day bills. That meant that I was given only thirty days to consider 856 bills. A great many of them were purely local in character; a great many of them were bills empowering the court of claims to hear and audit claims against the state.

This could be remedied by an amendment to the rules of the senate and assembly prohibiting the passage of purely local bills

after a certain date in the session, so that the legislature may pass its unimportant local bills in the early months of the session, leaving the calendars clear at the end of the session for a discussion of the large proposals that affect all the people of the state.

This procedure would also give to the governor plenty of time and opportunity, in the thirty-day-bill period, to study out the larger proposals, and not have his time and the time of his office force taken up in passing on little local matters.

My experience at the close of the last session showed me that the large number of bills left with me could not be intelligently disposed of unless I worked from 9.30 in the morning until 1 or 2 o'clock the following morning. It is too much of a strain to put on the governor, and leaves him useless for some time after.

There are numerous other small detail duties that fall upon the governor in dealing with the great number of boards and commissions that we have transacting the state's business. The governor would be greatly relieved by the passage of the constitutional amendments reducing the large number of boards and commissions to eighteen departments of government, presided over by men given by law the necessary power to transact all the business of their departments.

The governor is unable to deny to citizens of the state serving on boards and commissions without salary, an opportunity to present to him their views about what is going on in their different institutions. Nothing takes more of the governor's time than listening to the complaints about the management of various institutions, large and small, all of which detail ought to be up to a man charged with that duty and with no other. It is because of that condition that I had to make a special trip to Bedford Reformatory, following the recent newspaper stories of riot and disorder at that institution.

The total net result of a New York governor's too-plentiful duties is that the great, big, prominent questions that affect the welfare of a commonwealth of over 10,000,000 people are subordinated to the small, tiresome and irritating tasks that are put upon the governor by statute.

**b. Arch Mandel, on "How to Save Our Governors From Ruin"**

[*National Municipal Review*, vol. X, pp. 409-410 (Aug., 1921).]

Ex-Governor Smith of New York deploras the fact, and rightfully so, that governors are ruined by being obliged to attend

personally to innumerable and unimportant details of administration. This complaint doubtless strikes a sympathetic chord in the minds of every contemporary and ex-governor in the Union.

The statement that "unfortunately there is no deputy governor" made by Governor Smith in his article on "How We Ruin Our Governors" brings sharply to our attention an absurd tradition in the organization of our states and nation. New York State, and all other states have deputy governors, or lieutenant governors, as they are called, but for all practical purposes they might as well be non-existent.

In face of the burdens imposed upon governors in the administration of a commonwealth, lieutenant governors are pigeon-holed by being assigned the duties of presiding over senates and gracing public functions with their presence and speeches. Here are officers who could, if profitably employed, be of service to their states by releasing governors for their larger executive duties, and at the same time get things done for the state that governors, under present conditions, can only half do.

Furthermore, it must be borne in mind that all lieutenant governors are potentially governors; that when the occasion arises, and many such occasions have arisen, they must assume the office and duties of governor. Yet there is nothing in the duties performed by lieutenant governors that fits them to be chief executives of commonwealths. In fact, they are less fitted by training for this office than are chairmen of important legislative committees.

It must also be recognized that so long as the office of lieutenant governor carries with it nothing but an empty title, and is a blind alley politically, men of capacity and ability, men of large affairs who aspire to public service, will not seek the office nor will they have it thrust upon them.

Many of the ills described by Governor Smith will be corrected by the reorganization of the governmental machinery that tends to throw responsibility for getting things done upon a limited number of department heads of ability. Yet the governor as the executive of the state, responsible for the proper administration of all departments and institutions, must of necessity give some attention to these problems. Even with the help of capable department heads the task of giving personal attention to large problems affecting the welfare of a few million persons and following the administration of state activities is too big for one man.

Recognizing these facts, Dr. Wm. H. Allen, of the Institute for Public Service, in his report on the reorganization of Michigan's state government, recommended two alternative solutions for "insuring preparedness to assume the duties of a deceased or removed governor while at the same time giving the state better government:

Alternative 1. The lieutenant governorship might be combined with the auditorship in one elective officer, in which case the senate should select its own chairman as the assembly now does.

Alternative 2. The lieutenant governor might be given five more duties besides that of presiding over the senate:

1. Visit every state department and activity at least once a year;

2. Serve as chairman of statutory investigating boards, like the board of corrections and charities, without power to vote except in case of tie;

3. Attend meetings of semi-judicial bodies, like the utilities commission, with power to question witnesses;

4. Review budget estimates;

5. Report to the legislature at the end of each biennium evidence gathered from his studies of forward steps taken, of inefficiency and extravagance observed, and of administrative and legislative changes needed."

Carrying out these recommendations would serve two purposes:

1. It would lighten the burden of the governor, who cannot carry out the duties of his office, no matter how hard working, conscientious and willing he is to do so.

2. It would insure states efficient and capable governors should the men elected to the office resign or die, or become incapacitated.

## 145. THE GOVERNOR'S INITIATIVE IN LEGISLATION

In 1913 a rule was adopted by the house of representatives of the Illinois General Assembly which, although since abandoned, was an innovation worthy of notice in the direction of executive control over legislation. The actual position of the governor cannot, however, be fully appreciated by a mere reading of constitutions, laws, and rules. He exercises a certain amount of power, due largely to his personal and political influence, which greatly strengthens his position also in the field of legislation.

### a. Administration Measures in Illinois

[Morton D. Hull, in *American Political Science Review*, vol. VII, pp. 239-240 (May, 1913).]

"When any bill or resolution is introduced for the purpose of carrying into effect any recommendation of the Governor, it may by executive message addressed to the Speaker of the House be made an administration measure. An administration measure may be sent to the appropriate Committee or it shall upon request of its introducer, be sent to Committee of the Whole House. When such a measure has been reported out of Committee, it shall have precedence in the consideration of the House over all other measures except appropriation bills. The House shall sit in Committee of the Whole for the consideration of administration measures on Tuesday morning immediately after the reading of the House Journal."

The purpose of this rule is obvious. It is intended to give assurance to the governor that measures which he recommends will be given fair consideration and by such assurance to impose on him the obligation to have a legislative program. By so doing, it is hoped to give greater significance to party platforms and make in some small degree for party responsibility and party government.

It will be noticed that an administration measure *shall* be sent to the committee of the whole house upon request of its introducer. It is therefore mandatory so far as the rules are concerned that it be sent there on the request of the introducer. In practice the introducer will look over the standing committee to which the bill might otherwise be sent, and if he considers the personnel of the standing committee hostile to his measure will ask that it go to committee of the whole house. If the standing committee in question is favorably inclined he may prefer to have the bill go to such committee, especially if there is already a congestion of business before the committee of the whole house. Either method is open to him.

It will further be noticed that the rule sets a definite time, viz., Tuesday mornings, usually the time when the attendance is largest for consideration of administration measures. This is but recognizing that under a proper system of party government administration measures ought to be the main matters for legislative consideration. The constitution of Illinois, like the constitution of most States, requires that the governor shall make recommendations to the legislature of necessary legislation. Political practice also recognizes the chief executive as the party leader. It is right and proper, therefore, that having the obligation of making recommendations to the legislature and being recognized as the party leader, he should have the right to have

his recommendations considered—if need be even to the exclusion of other measures.

The rule is a distinct innovation in American legislative practice and has its precedent in the English parliamentary practice which gives to “government bills,” as they are called, precedence over “private members’ bills.” It but recognizes what is everywhere beginning to be recognized that the American separation of the executive and legislative departments of government is artificial and not in accord with the way in which men must act together in political parties under responsible leadership, unless popular government is to degenerate into drifting currents of chaos and confusion whipped hither and thither by irresponsible demagogues.

While the new rule follows an English precedent and it is hoped will help to make for party responsibility, the practice of English parliamentary government, which puts the English party leaders on the floor of the legislature to introduce and guide legislation is, of course, lacking. In this connection it is interesting to call attention to the recommendation made by ex-President Taft in a recent public speech that the members of the President’s cabinet should be given seats in Congress. Even more significant is the proposed constitutional amendment which was submitted to the voters of Oregon at the last election and I believe defeated, which provided for the consolidation of the two houses of the Oregon legislature into one, and which put the governor on the floor of the new legislative body with the right and duty to initiate legislation. . . .

### b. Methods of Executive Leadership

[Margaret C. Alexander, “The Development of the Power of the State Executive”, *Smith College Studies in History*, vol. II, no. 3, pp. 173-175 (Apr., 1917).]

. . . . .

In the field of legislation we find a less conscious attempt to strengthen the governor’s position. Gradually, through force of circumstance, however, his importance has increased until he has become the controlling force in legislation. In this respect the theory of government is against the governor, as the typical state constitution distinctly prescribes a separation of departments. Experience has proved the difficulty of applying this theory in actual government. The usurpation of executive power by the legislature and the tendency to restore to the exec-

utive his normal functions have been demonstrated. But the executive has also usurped legislative powers through the extension of the veto, a change in his legislative authority outside the range of any constitutional provisions. The reason for this change lies in the increasing popular demand for leadership. Our legislatures are tremendously active in turning out legislation. Every two years congress and the state legislatures together make about 25,000 laws, a large proportion of which, however, are special or local. The perspective of the average legislator is limited to his particular district, which makes him an excellent local representative. The state, however, has adopted so many paternal functions that a well constructed, comprehensive scheme of legislation is essential, and the legislators are generally incapable of furnishing such a scheme. The people, as such, cannot do so. Some one must be found to interpret their will and present it concretely to the legislature. Granting there are legislators with broad range of vision, the quality of the average member makes differentiation hard. Consequently the task of acting as the chief medium of progressive law-making has fallen to the governor. In his annual messages he outlines a legislative program for the year and supplements it with special messages. Every year bills known as "administration bills" are introduced, which really emanate from the governor. Furthermore, he appears before informal meetings of legislative committees and discusses with them questions of public policy, advocating measures which he thinks public opinion demands. Finally, he sends for members of the legislature to urge them to vote for particular measures. It has been said that the primary qualification now required of an assemblyman is intelligence enough to vote for what the governor wants. There are many examples of governors who have stood out as successful champions of advanced legislation, as for example, Governor Wilson in New Jersey, Governor Johnson in Minnesota, Governor Hoch in Kansas, Governor Harmon in Ohio, and Governor Hughes in New York. The necessity for the encroachment of the executive upon the ordinary functions of the legislative department has been so far recognized that one of our most conservative periodicals defended ex-Governor Hughes from the charge of executive usurpation on the ground that he first tried to ascertain what was best for the state and then publicly uttered his convictions. Such action, it contended, was not "government by executive usurpation but government by public opinion after discussion." The problem resolves itself into a choice between government by

the direction of the governor, a legally recognized agent, or by the political boss. The new role of the governor is to act as the virtual boss of the state and shape the course of legislation for the general benefit instead of for private and special interests. This has been so far recognized that plans have been suggested whereby the governor would be given the legal initiative in legislation and the right to take part in the debates of the legislature. . . .

#### 146. EXERCISE OF THE PARDONING POWER

The power to grant pardons and reprieves is a power vested in the governor of every state. Furthermore, it is a power quite freely exercised. It is, however, frequently subject to more limitation than is the similar power of the President, in that the governor is in many states permitted to act only after consideration and recommendation by some other authority, usually a pardon board. Whether or not there is such limitation, pardons will usually be granted or refused only after a hearing which takes the form of a quasi-judicial proceeding. The manner in which this power is exercised and the considerations that must guide a governor in these matters, are well illustrated by the actions taken in the recent notable Whitney case in California and the Sacco-Vanzetti case in Massachusetts.

##### a. Pardon of Anita Whitney, 1927

[Text in *New Republic*, vol. 51, pp. 310-313 (Aug. 10, 1927).]

There has been presented to me an application for the pardon of Charlotte Anita Whitney, who, on January 27, 1920, was tried in the superior court in Alameda County, before Superior Judge James G. Quinn, on a charge of violating the so-called Criminal Syndicalism Act. The information comprised five counts: first, that she had helped to organize, and had joined, an association prohibited by the Criminal Syndicalism Act; second, that she had circulated written or printed matter teaching and advocating violence as prohibited by that act; third, that by spoken and written words she had taught and advocated violence; fourth, that by spoken and written words she had justified the commission of violence; and fifth, that she herself had committed acts of violence.

Miss Whitney pled not guilty to these five charges, and on February 20, 1920, was found guilty on the first count—membership in an association believed by the jury to be prohibited by the act; but the jury refused to convict on the other four counts. She was sentenced to San Quentin Prison for a term of from one to fourteen years. The case was taken to the First District Court



of Appeal, presided over by Justices Tyler, Kerrigan and Richards, and on April 22, 1922, the judgment of the lower court was affirmed. A hearing before the state Supreme Court was denied, and the case was taken to the United States Supreme Court to test the constitutionality of the California Criminal Syndicalism Act. On May 16 of this year the court declared the law constitutional, though two of the justices in a separate opinion expressed regret that in the original trial there had not been raised the issue of danger or lack of danger from the particular organization which the defendant had joined.

I must confess that, when this application for pardon was first presented to me, I was very doubtful as to whether it could properly be granted. In the first place, I felt strongly that the orderly processes of our courts should not be interfered with, and that their verdicts should be upheld. Secondly, I felt, even though some of Miss Whitney's adherents questioned the wisdom or necessity of the law under which she was convicted, that, after the constitutionality of that law had been upheld by our highest court, its penalties must be exacted. I also felt that although, in the present case, a term in prison might seem harsh as applied to the particular individual concerned, on the other hand a pardon might seem a letting down of the bars designed for the protection of society.

To grant a pardon in advance of a parole, or even before any portion of a prison term is served, would seem a very unusual procedure; and I felt that such a pardon could not be forthcoming under anything like ordinary circumstances. However, I have since devoted several weeks to a study of the case, have read and re-read all of its thousand pages of transcript, have sought whatever light I could from the judges participating in the case, and from those possessing intimate and unbiased knowledge of the defendant and her activities. In short, I have made the most complete investigation of which I was capable, in order to determine whether, notwithstanding the decisions of the courts, there was reason for exercising that power of pardon which, under our form of government, is constitutionally placed in the hands of a chief executive.

I have now completed my investigation and study of this case, and have become completely convinced that, under all the circumstances involved, a pardon for Miss Whitney must issue. I am aware that many may not agree with me in this decision, but I would only suggest my belief that an equally thorough study

would inevitably bring a similar conclusion on the part of practically every doubter.

On November 9, 1919, there was held in the city of Oakland a state convention of an organization known as the Communist Labor party of California. This was an offshoot from the Socialist party and comprised the radical wing of that party. The state convention in question was held openly; reporters were present, and the story of the convention was told in the news columns of that afternoon and the next day. About one hundred delegates were present, Anita Whitney being one. The Oakland Socialist Local, to which she had belonged, went over to the new party and she went along with the others.

In the convention Miss Whitney was placed upon the committee of credentials and the committee of resolutions. As a member of the latter committee she argued for a resolution, the adoption of which she had secured in the committee. The resolution in question sought to pledge the new party to the ballot as a means of carrying out its aims. It read, in part:

The Communist Labor party of California fully recognizes the value of political action as a means of spreading communist propaganda; it insists that in proportion to the development of the economic strength of the working class, it, the working class, must also develop its political power. . . . Therefore, we again urge the workers who are possessed of the right of franchise to cast their votes for the party which represents their immediate and final interest.

After a considerable controversy this resolution was voted down, and instead there was adopted *in toto* the platform of the national organization, the Communist Labor party of America. Notwithstanding her defeat, Miss Whitney, as was perhaps natural, remained throughout the day of the convention, and, in fact, attended one or two committee meetings during the subsequent month. This, as far as the evidence discloses, marks the extent of her association with the Communist Labor party for membership in which she was subsequently convicted.

This autumn of 1919 was a period of much unrest and nervous tension as an aftermath of the Great War. Industries had to be readjusted, unemployment was rife, labor was extremely fearful of its future, new political theories and philosophies were everywhere projected. In this panic-stricken frame of mind which prevailed at the time, civic authorities were naturally suspicious and were prone to regard new political or social movements as revolutionary in tendency. Nevertheless, there were no arrests

as a result of this Communist Labor convention for nearly three weeks. Then as Miss Whitney was leaving a meeting of Oakland clubwomen where she had been speaking on the condition of the American Negro, she was placed under arrest on November 28, 1919. This action was taken at the direction of Fenton Thompson, inspector of police, under the authority of the Oakland Police Commission. . . .

Having been arrested, Miss Whitney was speedily brought to trial. The prosecution was conducted by two exceedingly able deputies from the district attorney's office. For the defense there was a rather elderly man with evidently little taste for court practice, and Thomas O'Connor, a brilliant attorney, who assumed entire charge of the case. This was in the midst of an epidemic of influenza, and during the trial one of the jurors contracted malady and died, her place being taken by a thirteenth juror, who had been empaneled for fear of such an occurrence. Another juror and Miss Whitney herself were for a time seriously ill. And, finally, Thomas O'Connor, the mainstay of the defense, was himself stricken.

For several days O'Connor, in spite of a raging fever, stuck to his post. At length he was forced to give up, and a two days' continuance was granted. On the expiration of this period the attorney was reported as very ill and delirious. The court decided that the case could not safely await his recovery, and ordered the trial to go on without him. A remark made during the colloquy by the assistant defense counsel, as to what might happen should the case proceed, seems strangely prophetic:

It probably will mean Mr. O'Connor's life, and it may mean a miscarriage of justice to this defendant.

Nevertheless, after ten minutes granted for consultation, the case went on. Two days later Mr. O'Connor died, taking with him to the grave all plans which he had made for the defense. Another lawyer, hastily summoned and of necessity unprepared, continued in the trial until the end, but with the result already noted.

Thus, I have tried to outline the nature of the charge upon which Miss Whitney was convicted, as well as some of the extraordinary circumstances attending her trial. It is true that we have the advantage of considering this in the calm light of our present knowledge, rather than in the excited days of 1919 and 1920. I do not believe it conceivable that today such a trial would take place, or a conviction be demanded even by the

strongest adherents of the Criminal Syndicalism Act. The trial having been held, however, and a conviction having been secured, it remains to be considered whether pardon at this time would be a proper action. On this point I should like to quote one of the ablest and most conservative legal minds in California, Orrin Kip McMurray, head of the School of Law in the University of California. In a recent letter, Professor McMurray says:

If Miss Whitney were to be tried today it is very improbable that a conviction could be had; indeed, it is scarcely possible that a district attorney would urge her prosecution. The testimony in her case is by no means strong and . . . should, I submit, hardly convince a California jury in 1927 that Miss Whitney is a dangerous person at the present time. The union of act and intent, though technically established, is rather faint. The Supreme Court of the United States, both in the majority and the minority opinion, review the facts sufficiently to indicate the conflict of testimony, concerning which the appellate courts had no power to judge. The Constitution has put this power of review in the Executive. As Chief Justice Taft remarks: "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of the circumstances which may properly mitigate guilt."

And then Dean McMurray goes on to show that conviction by a trial court under due process of law should be no bar to pardon, since the pardoning power of the Executive was established for the sole purpose of affording to a convicted defendant, where extraordinary circumstances exist, that clemency which, under their limited powers of review, appellate courts cannot furnish.

Supplementing this very comprehensive review by Professor McMurray, I should like to point out a few additional facts which must, I believe, convince anyone who makes a thorough study of the transcript of the trial. First, as has already been shown, there was the illness and death of Thomas O'Connor, the brilliant counsel for the defense, in the midst of the trial, under such distressing circumstances that not a single note of any kind was handed on to his hastily summoned and totally unprepared successor. From that time on the defense seems all at sea. The evidence offered in the case, for instance, was almost entirely confined to witnesses for the prosecution. As against more than twenty such witnesses, with the exception of one prosecution witness recalled, Miss Whitney herself was the only witness for

the defense, and her direct testimony occupies only three pages of the thousand-page transcript.

Moreover, a very large part of the testimony, and that which undoubtedly had most effect upon the jury, had to do, not with the Communist Labor party which Miss Whitney had joined, but with the I. W. W., with which she was never connected. The testimony was largely composed of a recital of atrocities committed in California by the I. W. W. from 1913 to 1918, the narrating of I. W. W. policies of lawlessness, sabotage, and crime, and the reading of incendiary and blasphemous I. W. W. songs. This evidence was admitted on the showing that a brief endorsement of the I. W. W. had been made in a special report on labor organization in the Communist Labor party—not the Communist Labor party of California with which Miss Whitney was connected in Oakland, but the national party at Chicago, whose platform the California party had formally adopted. I can not help believing that the conviction of Miss Whitney was largely due to the recital of these actions by the I. W. W., actions with which she had nothing to do, and occurring years before the offense for which she was indicted—the joining of a distinct and very different organization. I also can not help believing that, had Thomas O'Connor lived, this apparently extraneous testimony would never have been permitted to come before the jury, at least with the effect it actually had.

I furthermore believe that Justice Brandeis in his opinion has pointed out the chief weakness in this case. The law defines criminal syndicalism as involving "the commission of crime, sabotage, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change of industrial ownership or control, or effecting any political change." The Communist Labor party has practically disappeared, not only in California, but also in other states where no criminal syndicalism law existed. It was a visionary attempt to plant a European radicalism upon an American soil, where it simply could not thrive. I am unable to learn of any activities of this party, in California at least, or possibly in America, which ever rendered it a danger to the state or a menace to our institutions. I am satisfied that, in the light of our present knowledge, no charge of criminal syndicalism would be now brought against its members.

Justice Brandeis in his able review of the case expresses himself as follows:

Whenever the fundamental rights of free speech and assembly

are alleged to be invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. . . . Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the court or by the jury.

In a word, although the Supreme Court in its decision was forced to confine itself solely to the constitutionality of the law, the distinguished justice feels impelled to point out an essential element which was lacking at the original trial, and which, in my opinion, if employed as it should have been, would never have permitted conviction for mere membership in the Communist Labor party—a party with which probably none of us would have sympathy, but which was organized in an open public meeting, and in joining which Miss Whitney undoubtedly had no thought of breaking any law. In saying this, however, I am not unmindful of the fact that the jury at that time conceived the criminal syndicalism statute actually to apply, and that their verdict makes the defendant at least technically guilty. . . .

In a newspaper which reached my desk this morning I read the headlines, "Proposed Pardon of the *I. W. W. Leader*, Anita Whitney." I quote this because I believe it expresses a very common misconception. There is not the slightest evidence to show that Miss Whitney was either ever a member of the *I. W. W.* or ever subscribed to its principles or practices. In fact, it was clearly demonstrated in the trial that Miss Whitney had no connection with the *I. W. W.*, although she belonged to the Communist Labor party. I think it an acknowledged fact, abundantly proved, that the *I. W. W.* both advocated and practised violence, terrorism and sabotage in California. If anything like this is true of the Communist Labor party, I have never hear of it, and this trial certainly did not disclose it. Accordingly, while it might easily be shown that merely to belong to the *I. W. W.* constitutes criminal syndicalism, the charge would be certainly far more remote as applied to the Communist Labor party.

There are [those], lovers of liberty and free speech, who believe that any act like this must be so carefully applied as not to throttle that which must ever serve as the most indispensable birthright of every free American. These would quote the words

of Justice Brandeis as one of the finest expressions of the kind produced during the present generation:

Those who have won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . .

I believe that a careful reading of what I have here written will make my position plain. Once again I will say that I feel absolutely convinced that anyone who studies the transcript and records of this case, as I have studied them, will agree that there is no possible alternative to this pardon which I am granting. Of the hundred or more who helped organize the Communist Labor party in California, only two besides Miss Whitney were convicted, and in their cases the jury found them guilty, not only of membership in the party, but on other counts involving the actual advocacy, aiding, teaching or abetting of violence, on the part of the defendants themselves. These two, by the way, are not in prison. So far as I can ascertain, there never was a conviction in any case in the state of California, other than Miss Whitney's, solely on evidence of membership in the Communist Labor party—a conviction which has been well expressed as falling "within the outside limits of a technical violation of the law." Accordingly, her case can not be construed as representative of other and different convictions under the Criminal Syndicalism Act.

Let us very briefly sum up a few of the things I have tried to say above. I am issuing a pardon for Charlotte Anita Whitney in spite of my insistence that under all ordinary circumstances the verdicts of our courts must be upheld; in spite of the undoubted constitutionality of the law under which she was convicted; in spite of the fact that the courts have adjudged that in joining the Communist Labor party she violated the Criminal Syndicalism Act; in spite of my belief that nothing is more neces-

sary than to instill into our people a healthy respect for the dignity and majesty of Law.

I am issuing this pardon because I do not believe that under ordinary circumstances this case would ever have been brought to trial; because the abnormal conditions attending the trial go a long way toward explaining the verdict of the jury; because I feel that the Criminal Syndicalism Act was primarily intended to apply to organizations actually known as advocates of violence, terrorism, or sabotage, rather than to such organizations as a Communist Labor party; because the judges who have been connected with the case, as well as the authors and some of the strongest advocates of the law under which Miss Whitney was convicted, unite in urging that a pardon be granted; because not only the evidence at the trial, but also the testimony of all Miss Whitney's acquaintances, show her to have the utmost respect for law and to be averse to violence in any form; because her imprisonment might easily serve a harmful purpose by reviving the waning spirits of radicals, through making her their martyr; because, whatever may be thought as to "the folly of her misdirected sympathies," Miss Whitney, life-long friend of the unfortunate, is not in any true sense a "criminal," and to condemn her, at sixty years of age, to a felon's cell is an action which is absolutely unthinkable.

NOW, THEREFORE, I, C. C. YOUNG, GOVERNOR OF THE STATE OF CALIFORNIA, do hereby pardon Charlotte Anita Whitney.

### **b. Refusal of Pardon in Sacco-Vanzetti Case, 1927**

[Text in *N. Y. Times*, Aug. 4, 1927.]

Decision of Governor Alvan T. Fuller in the matter of the appeal of Bartolomeo Vanzetti and Nicola Sacco from the sentence of death imposed under the laws of the Commonwealth:

On April 15, 1920, a paymaster and his guard were held up, robbed and brutally murdered at Braintree, Mass. On May 15, 1920, Nicola Sacco and Bartolomeo Vanzetti were arrested; they were later tried and found guilty of the murder. The verdict was followed by seven motions for a new trial and two appeals to the Supreme Court of the Commonwealth, all of which were heard and later denied. Prior to the trial of the two men in this case Vanzetti had been arrested, tried and convicted of an attempted hold-up on Dec. 24, 1919, at Bridgewater, Mass., and sentenced to fifteen years' imprisonment.



The appeal to the Governor was presented by counsel for the accused on May 3 of the present year. It was my first official connection with the case.

This appeal, presented to me in accordance with the provision in the Constitution of our Commonwealth, has been considered without intent on my part to sustain the courts if I became convinced that an error had been committed or that the trial had been unfair to the accused.

I realized at the outset that there were many sober-minded and conscientious men and women who were genuinely troubled about the guilt or innocence of the accused and the fairness of their trial. It seemed to me I ought to attempt to set the minds of such people at rest if it could be done; but I realized that with all I could do personally to find out the truth, some people might well in the end doubt the correctness of any conclusion that I, or in fact any other one man, might reach. I believed that I could best reassure these honest doubters by having a committee conduct an investigation entirely independent of my own, their report to be made to me and to be of help in reaching correct conclusions.

I felt that if, after such a committee had conducted its investigation independently, we were not in substantial agreement, then the course of Massachusetts justice did not flow in as clear a channel as I believed it should. The final decision and responsibility was, of course, mine.

For this committee I desired men who were not only well and favorably known for their achievements in their own lines, but men whose reputation for intelligence, open-mindedness, intellectual honesty and good judgment were above reproach. I asked to serve on that committee, President Abbott Lawrence Lowell of Harvard University, former Judge Robert Grant and President Samuel W. Stratton of Massachusetts Institute of Technology.

No one of them hesitated when asked to serve. They began work as soon as their other affairs could be arranged, labored continuously during much of June and through July, holding their sessions independently, and arrived unanimously at a conclusion which is wholly in accord with mine. The public owes these gentlemen its gratitude for their high-minded, unselfish service on this disagreeable and extremely important problem.

The court proceedings in this case may be divided into two parts: First, the trial before the jury with Judge Thayer presiding; second, the hearings on the successive petitions for a new

trial which were addressed to the judge and passed upon by him. All those proceedings have been attacked by some of the friends of the accused men and their counsel.

The attacks on the jury trial take two forms: First, it is asserted that the men are innocent and that there was not sufficient evidence before the jury to justify a finding of guilty; second, it is asserted that the trial itself was unfair.

The attacks on the proceedings and on the motions for a new trial are in substance that the judge was biased and unable to give the motions fair and impartial consideration.

The inquiry that I have conducted has had to do with the following questions:

Was the trial jury fair?

Were the accused entitled to a new trial?

Are they guilty or not guilty?

As to the first question, complaint has been made that the defendants were prosecuted and convicted because they were Anarchists. As a matter of fact, the issue of anarchy was brought in by them as an explanation of their suspicious conduct. Their counsel, against the advice of Judge Thayer, decided to attribute their actions and conduct to the fact that they were Anarchists, suggesting that they were armed to protect themselves, that they were about to start out at 10 o'clock at night to collect radical literature and that the reason they lied was to save their friends.

I have consulted with every member of the jury now alive, eleven in number. They considered the judge fair; that he gave them no indication of his own opinion of the case.

Affidavits have been presented claiming that the judge was prejudiced. I see no evidence of prejudice in his conduct of the trial. That he had an opinion as to the guilt or innocence of the accused after hearing the evidence is natural and inevitable.

The allegation has been made that conditions in the court room were prejudicial to the accused. After careful inquiry of the jury and others, I find no evidence to support this allegation. I find the jurors were thoroughly honest men and that they were reluctant to find these men guilty, but were forced to do so by the evidence.

I can see no warrant for the assertion that the jury trial was unfair.

The charge of the Judge was satisfactory to the counsel for the accused, and no exceptions were taken to it. The Supreme Judicial Court for the Commonwealth has considered such of the more than 250 exceptions taken during the trial as counsel for

the accused chose to argue and overruled them all, thus establishing that the proceedings were without legal flaw.

I have read the record and examined many witnesses and the jurymen to see from a layman's standpoint whether the trial was fairly conducted. I am convinced that it was.

The next question is whether newly discovered evidence was of sufficient merit to warrant a new trial.

After the verdict against these men, their counsel filed and argued before Judge Thayer seven distinct supplementary motions for a new trial, six of them on the ground of newly discovered evidence. All of which were denied.

I have examined all of these motions and read the affidavits in support of them to see whether they presented any valid reason for granting the accused men a new trial. I am convinced that they do not and I am further convinced that the presiding Judge gave no evidence of bias in denying them all and refusing a new trial.

The Supreme Judicial Court for the Commonwealth, which had before it appeals on four of the motions and had the opportunity to read the same affidavits which were submitted to Judge Thayer, declined to sustain the contentions of the Counsel for the accused. In my own investigations on the question of guilt, I have given these motions and their supporting affidavits and the witnesses every consideration.

I give no weight to the Madeiros confession. It is popularly supposed he confessed to committing this crime. In his testimony to me, he could not recall the details or describe the neighborhood. He furthermore stated that the Government had double-crossed him and he proposes to double-cross the Government. He feels that the District Attorney's office has treated him unfairly because his two confederates, who were associated with him in the commission of the murder for which he was convicted, were given life sentences, whereas he was sentenced to death. He confessed the crime for which he was convicted. I am not impressed with his claim to knowledge of the South Braintree murders.

It has been a difficult task to look back six years through other people's eyes. Many of the witnesses told me their story in a way I felt was more a matter of repetition than the product of their memory. Some witnesses replied that during the six years they had forgotten; they could not remember; that it was a disagreeable experience and they had tried to forget it.

I could not hope to put myself in the position of a jurymen and

have the advantage of seeing the witness on the stand and listening to the evidence and judging the spoken word. The motions for a new trial, however, were all made from affidavits and therefore they could be reviewed under the same circumstances as prevailed when the judge heard them.

The next question and the most vital question of all, is that of the guilt or innocence of the accused. In this connection I reviewed the Bridgewater attempted hold-up for which Vanzetti had previously been tried before another jury and found guilty. At this trial Vanzetti did not take the witness stand in his own defense. He waived the privilege of telling his own story to the jury, and did not subject himself to cross-examination.

Investigating this case, I talked to the counsel for Vanzetti at the Plymouth trial, the jurymen, the trial witnesses, new witnesses, present counsel and Vanzetti. I have talked with the Government witnesses who saw the Bridgewater hold-up and who identified Vanzetti, and I believe their testimony to be substantially correct.

I believe with the jury that Vanzetti was guilty and that his trial was fair. I found nothing unusual about this case except, as noted above, that Vanzetti did not testify. In the Bridgewater case, practically every one who witnessed the attempted hold-up and who could have identified the bandits identified Vanzetti.

The South Braintree crime was particularly brutal. The murder of the paymaster (Parmenter) and the guard (Berardelli) was not necessary to the robbery. The murders were accomplished first, the robbery afterward. The first shot laid Berardelli low in the roadway, and after Parmenter was shot, he dropped the money box in the road and ran across the street.

The money could then have been taken, but the murderers pursued Parmenter across the road and shot him again, and then returned and fired three more shots into Berardelli, four in all, leaving his lifeless form in the roadway.

The plan was evidently to kill the witnesses and terrorize the bystanders. The murderers escaped in an automobile driven by one of their confederates, the automobile being afterward located in the woods at Bridgewater, eighteen miles distant.

Vanzetti, when arrested on May 5, had in his hip-pocket a fully loaded revolver. Sacco had a loaded pistol tucked into the front of his trousers and twenty loose cartridges which fitted this pistol.

Upon being questioned by the police both men told what they afterward admitted was a tissue of lies. Sacco claimed to have

been working at Kelly's shoe factory on April 15, the date of the South Braintree crime. Upon investigation, it was proven that he was not at work on that day.

He then claimed to have been at the Italian Consulate in Boston on that date, but the only confirmation of this claim is the memory of a former employee of the Consulate who made a deposition in Italy that Sacco among forty others was in the office that day. This employee had no memorandum to assist his memory.

As the result of my study of the record and my personal investigation of the case, including my interviews with a large number of witnesses, I believe, with the jury, that Sacco and Vanzetti were guilty and that the trial was fair.

This crime was committed seven years ago. For six years, through dilatory methods, one appeal after another, every possibility for delay has been utilized, all of which lends itself to attempts to frighten and coerce witnesses, to influence changes in testimony, to multiply by the very years of time elapsed the possibilities of error and confusion.

It might be said that by undertaking this investigation I have contributed to the elaborate consideration accorded these men. My answer is that there was a feeling on the part of some people that the various delays that had dragged this case through the courts for six years were evidence that a doubt existed as to the guilt of these two men.

The feeling was not justified. The persistent determined efforts of an attorney of extraordinary versatility and industry, the Judge's illness, the election efforts of three district attorneys, and dilatoriness on the part of most of those concerned are the principal causes of delay. The delays that have dragged this case out for six years are inexcusable.

This task of review has been a laborious one and I am proud to be associated in this public service with clear-eyed witnesses, unafraid to tell the truth, and with jurors who discharged their obligations in accordance with their convictions and their oaths.

As a result of my investigation I find no sufficient justification for Executive intervention.

I believe with the jury, that these men, Sacco and Vanzetti, were guilty and that they had a fair trial. I furthermore believe that there was no justifiable reason for giving them a new trial.

(Signed) ALVAN T. FULLER.

## CHAPTER XXIII

### STATE ADMINISTRATION

#### 147. ADMINISTRATIVE REORGANIZATION

Prior to 1917 Illinois, like most other states, had a cumbrous administrative machinery composed of a group of elective officers and over a hundred boards and commissions. In 1913 an Efficiency and Economy Committee was created which made an investigation and, in 1915, a report recommending the abolition and consolidation of numerous boards and commissions. Little was done to carry out these recommendations until 1917 when the legislative session of that year enacted the civil administrative code, which organized most of the state administrative work into nine departments, each under a director appointed by the governor. This was the most important step which up to that time had been taken by any American state towards administrative reorganization. The man who was probably most responsible for putting the civil administrative code through the legislature was Frank O. Lowden, governor of Illinois from 1917 to 1921. The example of Illinois was followed by several other states, including New York. In that state Governor Smith introduced also a form of cabinet which has already proved very useful.

##### a. Reorganization of State Administration in Illinois

[Frank O. Lowden, in *National Municipal Review*, vol. XV, pp. 8-13 (Jan., 1926).]

During the last century every great private industry has undergone a complete transformation. As civilization has become more complex the machinery of business has changed continuously to meet its changing needs. In the machinery of government alone progress has not kept pace with the needs. Yet the business of government has grown in complexity and in the number of subjects with which it deals quite as rapidly as has private enterprise. This failure has been due largely to the fact that until recent years the total expenses of government were so small relatively as to influence but little the general prosperity of the country. During political campaigns, parties frequently charged each other with extravagance, but the people were little interested because the revenues were largely derived from indirect sources and no burden was felt.

Now, however, state and federal taxes, by virtue of their weight, have become directly related to all economic questions of

the day. Who can doubt that the heavy taxes levied by government are an important factor in the high cost of living? The government is powerless to prevent a substantial part, at least, of such taxes being passed on to the consumer. We now see that no form of taxation has been devised which will be borne by the rich alone. The community as a whole, in one form or another, must pay the cost of government.

Business and industry generally, in making plans for the future, must reckon first with the question of taxes, which have reached the point where private initiative is discouraged and where enterprise in some cases halts.

Even before the war men were impressed by the continued increase in the expenses of city, state and national government. The activities of government have multiplied rapidly during recent years. When the state or nation had decided to take on some new function, instead of fitting it into some agency of government already established, it usually created an entirely new body. Sometimes it was an official; oftener it was a board or commission.

The commission had come to be a very popular form. It provided good places for aspirants to office, and, being a law unto itself, the members could attend to their private affairs and give one or two days a month—usually about the time the pay rolls were made up—to the public service. When once commissions were created it was almost impossible to abolish them. There is nothing more difficult in government than to get rid of a lucrative office once established. This practice had become quite general.

When I became governor of Illinois, in January, 1917, there were something over one hundred and twenty-five independent and unrelated agencies of the state government, sometimes composed of boards, sometimes commissions, and sometimes individual officials. In fact, so confused was the situation that no two agreed upon just exactly how many independent activities the state was conducting. Necessarily, this resulted in much overlapping of work. In purchases there was competition between the different agencies of the government, and there was, of course, needless expense. Above all, there was greatly reduced efficiency. In theory these various offices were supervised by the governor, but in fact it was absolutely impossible for him to exercise any adequate supervision over them. They were scattered over the state, frequent personal contact with them was out of the question, and for all practical purposes the state government

was without an actual head. Energetic and competent administration was impossible.

One consequence of this haphazard method, or lack of method, of government was lack of law enforcement. Something went wrong or seemed to go wrong, and a law was enacted, and there the matter rested, as though the law were an end in itself. We were confronted with a problem requiring solution and then the legislature passed the problem on to a commission and felicitated itself that it had solved the problem. It is a grievous error to enact a law and then to disregard it. Even the best law badly administered is worse than none. For ours is a government of law. In America the sovereign power resides in the people, but the people speak only through the law. Whenever, therefore, law is disregarded, the sovereignty of the people is insulted, and no sovereign power, whether it be *demos* or king, can long rule unless it has the vigor and the will to vindicate itself.

The problem was to gather up the scattered agencies and to reorganize them into departments of government. Upon a study of the nature of these agencies, we concluded that they logically fell into nine groups. We then abolished the more than one hundred and twenty-five boards, commissions and independent offices, and created nine new departments, to take over their functions. These departments were: (1) finance, (2) agriculture, (3) labor, (4) mines and minerals, (5) public works and buildings, (6) public welfare, (7) public health, (8) trade and commerce, and (9) registration and education. The powers and duties of each department were defined by the code.

The question then arose as to whether these departments should be under the control of individuals or of commissions. In acquiring the habit of creating a board or a commission to take care of government work, we have assumed that if something important was to be done it would be best done if done by a body of men, and not an individual. The fact is—as all who have had experience in business of any kind know—that it is the individual who does things, not a board or a commission. There is no commission anywhere, there is no board anywhere, that does things affirmatively unless it is dominated by one man, and the only benefit from the other members of that body is in their advisory capacity.

Always it is an individual on the board or commission who takes the initiative, and the body is fortunate if the other members do not hamper him. I am speaking now of administration. A commission may be desirable where quasi-judicial or quasi-



legislative powers are exercised. Where, however, the duties are purely or largely ministerial, experience has shown that it is a man, not a body of men, who gets results.

There are some who have assumed that large responsibility could be more safely deposited in a body of men than in a single man. Experience has not justified this. Where the responsibility is upon the individual, he cannot shirk it. Where it is placed in a body of men, the individual can find shelter behind that body, when called to account for the manner in which he has exercised his power.

There also is a deadly inertia in a board or commission which is not so likely to be found in the individual. It is a true saying that "what is everybody's business is nobody's business." It is equally true that where several members of a board or commission share a given responsibility, no one of them feels that responsibility as keenly as though he bore it alone. Good and efficient public service makes it mandatory that responsibility be fixed definitely. Then only can a public official be held to a strict accountability. Responsibility can be definitely placed only if it be reposed in an individual. For these reasons, in Illinois we placed at the head of each of the nine departments an individual, whom we called a director, and not a board or commission.

In his recent biography, Henry Watterson illuminated this point:

Patriotism cries "God give us men," but the parties say "Give us votes and offices," and Congress proceeds to create a commission. Thus responsibilities are shirked and places are multiplied.

It may happen, however, that the head of a department, upon some important question of policy, would like the advice of able and experienced men. We, therefore, provided advisory committees. The members serve without pay. We have found that many of the ablest men in Illinois are perfectly willing to serve upon an advisory committee without pay, although they could not be induced to take a salaried position. In this way we availed ourselves of the best talent within the state upon the various subjects of state administration.

The Illinois civil administrative code provides for the various subordinate officers within the several departments. It does not, however, attempt to define their precise duties. These duties are prescribed in rules and regulations formulated by the head of the department, and not by statute law. Much debate arose over this proposition. It was objected that this conferred too much power upon the individual head of a department. Many thought that

the code should define precisely the duties of the heads of divisions in the several departments.

In my judgment, to have adopted that theory would have greatly impaired the efficiency of the code. "Red tape" would have inevitably crept in. Much of the delay, the inconvenience, even the inaction which results from what we call "red tape" is not so much the fault of the official as it is of the law. This is true alike of laws of the state legislatures and Congress. Where Congress, in launching government into some new activity, has created a bureau or division, the law makers have customarily gone into infinite detail—they have prescribed with exactitude the duties of each official; they have so limited and delimited the powers to be exercised that the bureau or division is in no sense under the control or direction of the head of the department to which it belongs. The result is inevitable. Instead of actually molding and directing a single department in all its parts, he becomes the presiding officer over a large number of bureaus, each of which is practically independent of all the others.

It is said that there are ten departments of government at Washington. That is so only in name. In fact, there are many times ten independent and practically unrelated agencies of government there. No department under these circumstances can avoid becoming rigid and lawbound, and "red tape" necessarily becomes the rule. If, instead, the department head were authorized to prescribe the duties of subordinates, the "red tape" would largely disappear. The responsible head would have power commensurate with his responsibility. Instead of an inert mass you would have a living organism with an actual head.

Democracy has been afraid of itself and of its own chosen officials, and has hedged them about with so many restrictions that genuine efficiency has been well-nigh impossible. We have framed our laws as though they were to execute themselves, providing in detail for every contingency, leaving no means by which the head could meet unforeseen contingencies. We have gone on the theory that we could tie men's hands for evil, but at the same time leave them free for good. . . .

The chief officials under the Illinois code, such as directors of departments, have their offices in the Capitol at Springfield. The directors of departments and the adjutant general, who is the head of the military department of the state, constitute the governor's cabinet. The governor thus is in daily touch with every activity of the state government. If a weakness develops in the remotest part of the state, he has the means at hand to

correct it promptly through the head of the proper department. The head of the department, in turn, through his chiefs of division, over whom he has complete control, can at once reach the weak spot.

An outstanding achievement of the code was that of locating and correcting extravagance and incompetency. This was done through the department of finance, one of the nine departments, as we have seen. This department was made the keystone of the structure. It exercised two sets of powers: (1) it was charged with the general supervision of the finances of the state; and (2) it was required to prepare a budget.

The department of finance was a new conception in our state government—and in the government of any American state, I think. Its function was to see that the government lived within its income, that unnecessary expenditures were checked, that unwise expenditures were prevented and the policies of departments were controlled and co-ordinated. While other departments were imbued with the ambition to extend departmental activities, the department of finance occupied the position of sympathetic critic, proportioning expenditures so as to carry out all administrative policies. By this means a well-balanced administration, serving the needs of the whole state, was secured. Without it, expenditures were incapable of apportionment in accordance with the needs of the various branches of government.

Financial control occupied a large part in the activities of the department. The law charged it with the duty of prescribing a uniform system of bookkeeping, with the duty of examining and approving, or disapproving, of all bills, vouchers and claims against the other departments. This power compelled other departments, not as a matter of law, but as a matter of administrative expediency, to consult the department of finance before any unusual expenditure was made and to procure its advice. In order still further to promote co-ordination of expenditures, as well as co-operation among the departments, meetings of directors were held and financial as well as other policies were discussed. The result of this procedure cannot be stated in dollars and cents. It did not appear upon any particular balance sheet. It was reflected in the general result, not only in unity and efficiency of administration, but in the tax levy, which, in times of mounting prices, had been reduced.

As has been seen, the department of finance was also required to prepare a budget of estimated expenditures and receipts, to be submitted to each regular session of the general assembly. In

the exercise of his general supervision over expenditures, the director of finance in effect began the preparation of the budget a biennium in advance. That is, on the first of July, 1917, in approving or disapproving vouchers and investigating into the financial conditions, he was gathering information all the while to enable him intelligently to judge what the appropriations should be for the next biennium. When the next legislature met in January, 1919, the director of finance had a budget ready. He had the information he had acquired as to the needs of the various activities of the state in the exercise of his power of general supervision over the finances, and in addition he had been able to investigate, himself, when a request was made by any official charged with the expenditure of money, as to the exact needs of the case. The budget thus submitted went before the appropriation committees of the house and senate, and with very few changes was enacted into law.

#### b. Cabinet System in New York

[Joseph McGoldrick, in *National Municipal Review*, vol. XVI, pp. 226-228 (Apr., 1927).]

The Short Ballot Amendment approved by the voters of New York state in 1925, reducing the number of elective state officials to four and requiring the consolidation of all government activities into not more than nineteen departments, is now in force and effect. The first elections under the new amendment were held last fall. Governor Smith, a Democratic lieutenant governor and a Democratic comptroller were elected together with one Republican, Attorney General Ottinger. The legislation emanating from the Hughes Reorganization Commission also took effect January, 1927. Under these acts, the great welter of boards, bureaus, and offices that had constituted the government of the state were brought within eighteen departments.

As a corollary to the establishment of this new organization of the state's government, the governor has created, on his own initiative, a cabinet. The cabinet has no more status in law than the President's cabinet. As Governor Smith points out: "It is the right thing. Periodical conferences of department heads are a matter of routine in every big business establishment. They could not get along without such gatherings. The state, with its highly organized business, can even less afford to dispense with councils of that character." The institution is, therefore, likely to be continued by subsequent governors.

The cabinet is likely to achieve two purposes: It will aid the governor in determining the policies of his administration—his legislative program, his dealings with water power, the spending of the \$100,000,000 bond issue authorized in 1925, and the other questions which press for solution. The cabinet is likely also to be an important aid to coördinated administration, the thing which Governor Smith emphasizes particularly. To quote him again: "The primary purpose of these meetings will be to bring about coördination and coöperation in the activities of the state, and to make the head of one department acquainted with what another department is doing. We want to benefit in common from the accumulated experience of all. Where the work of one department is as closely related to that of another, as we find in the administration of the state, it is of the highest importance that the department heads should be brought together to discuss problems of mutual concern which they must meet in common."

The governor's cabinet consists of fourteen officers, those invited to the first meeting being:

George B. Graves, assistant to the governor and head of the executive department.

M. F. Loughman, head of the department of taxation and finance.

Robert Moses, secretary of state.

Colonel Frederick Stuart Greene, state superintendent of public works.

Sullivan Jones, state architect.

Alexander MacDonald, head of the department of conservation.

Berne A. Pyrke, commissioner of agriculture and markets.

Dr. James A. Hamilton, industrial commissioner.

Dr. Frank P. Graves, commissioner of education.

Dr. Matthias Nicoll, commissioner of health.

Dr. Frederick W. Parsons, commissioner of mental hygiene.

Charles S. Johnson, director of state charities.

Dr. Raymond F. C. Kieb, commissioner of correction.

Mrs. C. B. Smith, head of the state civil service commission.

This includes the heads of all the state's departments except five. Two of these—the department of audit and control, and the department of law—are under elective officials, the comptroller and the attorney-general respectively. In not inviting these, the governor suggested that their offices were routine merely. The attorney general is, however, a Republican, and by reason of his election during the Smith landslide, one of the most conspicuous members of his party in the state. It is more than likely that were the incumbent a member of his own party, the governor would have included him in the cabinet. As it is, the

governor has—as he has always had—his own legal adviser. The heads of the department of insurance, the department of banking, and the department of public service are also absent from the cabinet list. The first two are clearly routine, while the latter is presided over by the state public service commission, a quasi-judicial body.

The appointments of the men who have come to constitute the governor's cabinet occasioned considerable notice when they were offered to the senate at the first of the year. The governor was accused of political ambition when he included six Republicans in his list. The truth of the matter is that though all of the six are of Republican antecedents, no one of them has been actively identified with that party in recent years. In fact, all of them have been Smith Republicans during most of the Smith régime at Albany. A noteworthy thing about the appointments, aside from their high standards of excellency, is the fact that, apart from Mr. Moses, all of the others were already in office. Mr. Moses, as secretary of the New York State Association has long been one of the governor's closest counsellors and with one or two others had constituted a "Kitchen Cabinet."

While the cabinet has attracted particular attention, it is noteworthy also that the governor is developing a coördinating staff. The Hughes Commission declined to recommend a department of interdepartmental relations, but the governor is developing his own staff in such persons as Mr. Graves, the assistant to the governor and head of the executive department; Mr. Moses, the secretary of state; Mr. Sullivan Jones, the state architect, the only person not a department head who has been made a member of the cabinet, and Mr. Wilson, the director of the budget. Mr. Wilson, though not having a vote in the cabinet, will attend its meetings. It was interesting to note that Mr. Moses, who as secretary of the state will have relatively little to engage him, was placed upon the three most important of the five committees appointed at the first cabinet meeting.

The first meeting was held on Wednesday, February 9. It is planned to have these cabinet meetings follow every two weeks. The proceedings are completely secret aside from what the governor discloses to newspaper men after adjournment. Apart from the members and those specifically invited to attend, the only persons present are the governor's assistant secretary, who acts as secretary to the cabinet, and a stenographer. The agenda or calendar of the first meeting as made public was as follows:

1. Purpose of meetings. Procedure—to be explained by the governor.
2. Reorganization problems to be outlined and discussed.
3. Schedule of all public improvement projects financed from bond issue and other sources to be discussed and ordered prepared. Procedure for keeping it up to date. To be checked and discussed at each meeting.
4. Problem as to New York city office buildings. Appointment of committee.
5. Institutional problems involved in reorganization. Appointment of committees to coördinate work where several departments are involved.
6. Discussion of certain county and regional problems involving close relation between state and local agencies, county government roads and parkways, sewers and country health, etc. Committee to be appointed.
7. Discussion of exchange of personnel incident to reorganization.

The government of the state of New York is certainly one of the largest business undertakings in the country. The state has the third largest public budget in the United States, amounting to more than \$200,000,000, being exceeded in size only by the budgets of New York city and the national government.

Such tremendous enterprises could not long continue to ignore the problems of administration and the lessons of business practice. Governor Smith has been accused of aiming to make a record with 1928 in mind. It would be hard to find a better way of bringing himself before the American people. It is unfair to attribute too much of the publicity which has attended his efforts to his own ambition. Circumstances have made him a national figure and the eyes of the whole country are upon him. Above all it is noteworthy that the governor's interest in matters of administration is not a new thing but has been a characteristic of his entire occupancy of the gubernatorial office.

#### 148. PRINCIPLES UNDERLYING ADMINISTRATIVE REORGANIZATION

Administrative reorganization in New York State was recommended by Governor Charles E. Hughes as early as 1910. A provision looking in this direction was inserted in the defeated constitution of 1915. In 1918 Governor Alfred E. Smith appointed the Reconstruction Commission which in the following year made an excellent report on "Retrenchment and Reorganization in the State Government." At the outset of this report a statement is made of the existing irresponsible organization and of the

principles underlying administrative reconstruction, from which the following extract is taken.

*[Report of Reconstruction Commission to Governor Alfred E. Smith on Retrenchment and Reorganization in the New York State Government, October 10, 1919, pp. 3-5, 7-8, 11-12.]*

In searching for valid principles on which to base retrenchment and economy in administration we have naturally turned to the experience of other states. Common sense dictates that New York should first of all study carefully the steps which have already been taken elsewhere, with a view to introducing improved methods into the conduct of public business. In making this inquiry the Commission has found that in nearly every State public attention has been forcibly drawn to the necessity of reducing expenditures or at least holding them to the lowest point consistent with the proper discharge of public functions and fair conditions of employment. The Commission has also found that the movement for economy and efficiency has passed beyond the stage of protest and discussion. Between 1911 and 1917 (when the movement was temporarily checked by the war), a number of States instituted commissions of inquiry for the purpose of discovering more business-like methods in state administration. Examination of the laws creating these commissions brings out the fact that waste and duplication, inevitably accompanying the maintenance of conflicting and competing offices and boards, were the main cause which led these states to seek relief. The reports filed by the several commissions are in substantial agreement on the following points:

1. State administration is a collection of offices, boards and other agencies which have been created from time to time by legislative act without consideration being given to the desirability of grouping all related work in one department.

2. The board or commission type of organization for purely administrative work is generally inefficient owing to the division of powers and absence of initiative and responsibility. This applies with less force to departments in which there are important quasi-judicial or quasi-legislative functions combined with administrative functions. Boards have been successful in many cases in carrying out advisory and inspectional functions and in the general supervision of education. Ex-officio boards are almost never effective.

3. Widely scattered and independent agencies of state government cannot be effectively supervised and controlled either by the Legislature or the Governor.



4. When such a large number of agencies is independent of the Governor, he cannot be held responsible to the voters for an efficient and economical management of public business.

In their recommendations for improvement of administration, the commissions are substantially agreed that economy and responsible government can only result from:

1. The consolidation of offices, boards and commissions into a few great departments of government, each of which is responsible for the conduct of a particular major function such as finance, health, welfare, or public works.

2. Vesting the power of appointment and removal of department heads in the Governor; making him in fact, as well as in theory, the responsible Chief Executive of the state. There is a difference of opinion as to the desirability of confirmation of the Governor's nominations by the Senate.

3. A consolidated budget system with accounting control over spending officers.

The budget recommendations have passed beyond the theoretical stage, for thirty-eight states have enacted legislation providing for a consolidated budget system with varying provisions as to methods of preparation, legislative review, and enactment into law. Half of these States have placed the responsibility for initiating the budget squarely upon the Governor.

The recommendations with reference to the reorganization of boards, offices and commissions have not been accepted by the state Legislatures as readily as proposals for budget reform. The reasons are obvious. A consolidation of a hundred or more offices, boards and other agencies affects political patronage more vitally than does a budget system, and it requires considerable courage and intelligence on the part of a Legislature to reorganize an entire system of state government. Nevertheless, recommendations of commissions are passing steadily into law. . . .

. . . It is sufficient in passing to note that there are five departments and numerous independent boards having authority over the custody of the state parks, reserves and places of interest; that there are more than seven departments assessing and collecting taxes, one of which audits its own collections; more than ten departments of an engineering character; numerous, separate and distinct control and visiting departments, boards and commissions for the correctional, insane and charitable institutions; that the legal functions are scattered through ten departments, beside that of the Attorney-General, and that there are numerous administrations of educational institutions. It is quite

apparent that a consolidation of many departments or bureaus should be brought about. . . .

The existing system of administration stands condemned by its obviously objectionable features. It is a vast business enterprise divided into more than one hundred and eighty different parts each running along its own lines, without a responsible head. The Constitution says that the executive power shall be vested in the Governor, but at the same time the Constitution and the laws strip him of the instruments for exercising that power. The officers, commissioners and agents who do the business of the state are not responsible to one authority; they are appointed and removed by many different methods. Their terms overlap and their tenures vary. No Governor can be held responsible for the policies and conduct of high officers whom he does not appoint and whom he can not remove. It is clear that if New York wants retrenchment and efficient government it must make some one responsible who can be held to account and give him power commensurate with his obligations. There is no other way.

. . . . .

The experience of other States in the Union, the experience of the national government with a consolidated administration and a cabinet system and the recommendations of competent authorities lead us to the conclusion that retrenchment and responsibility in the government of the State of New York can be achieved only through:

1. A consolidation of all administrative departments, commissions, offices, boards and other agencies into a small number of departments, each headed by a single officer, except departments where quasi-legislative and quasi-judicial or inspectional and advisory functions require a board.

2. The adoption of the principle that the Governor is to be held responsible for good administration and is to have the power to choose the heads of departments who are to constitute his Cabinet and who are to be held strictly accountable to him through his power to appoint and remove and through his leadership in budget preparation. This involves among other things the reduction in the number of elective administrative officers to two: the Governor and a Comptroller to act as independent financial auditor. Although there are objections to the confirmation by the Senate of nominations by the Governor, we are of the opinion that this check has on the whole worked well and should be retained.

3. The extension of the term of the Governor to four years and the careful adjustment of the terms of department heads with reference to the term of the Governor. Excepting members of boards with overlapping terms, department heads should have the same term as the Governor.

4. The grouping of related offices and work in each of the several departments into appropriate divisions and bureaus, responsibility for each branch of work to be centralized in an accountable chief.

5. A budget system vesting in the Governor the full responsibility for presenting to the Legislature each year a consolidated budget containing all expenditures which in his opinion should be undertaken by the State, and a proposed plan for obtaining the necessary revenues—such a budget to represent the work of the Governor and his Cabinet. Incorporation of all appropriations based upon the budget in a single general appropriation bill. Restriction of the power of the Legislature to increase items in the budget. Provision that special appropriation bills shall secure the specific means for defraying appropriations carried therein.

The only serious argument advanced against such a proposed reorganization and budget system is that it makes the Governor a czar. The President of the United States has administrative powers far greater than those here proposed to be given to the Governor. The Mayor of the City of New York appoints and removes all of the important department heads, and citizens know whom to hold accountable. The Governor does not hold office by hereditary right. He is elected for a fixed term by universal suffrage. He is controlled in all minor appointments by the civil service law. He cannot spend a dollar of the public money which is not authorized by the Legislature of the State. He is subject to removal by impeachment. If he were given the powers here proposed he would stand out in the limelight of public opinion and scrutiny. Economy in administration, if accomplished, would redound to his credit. Waste and extravagance could be laid at his door. Those who cannot endure the medicine because it seems too strong must be content with waste, inefficiency and bungling—and steadily rising cost of government. The system here proposed is more democratic, not more “royal” than that now in existence. Democracy does not merely mean periodical elections. It means a government held accountable to the people between elections. In order that the people may hold their government to account they must have a govern-

ment that they can understand. No citizen can hope to understand the present collections of departments, offices, boards and commissions, or the present methods of appropriating money. A Governor with a Cabinet of reasonable size, responsible for proposing a program in the annual budget and for administering the program as modified by the Legislature may be brought daily under public scrutiny, held accountable to the Legislature and public opinion, and be turned out of office if he fails to measure up to public requirements. If this is not democracy then it is difficult to imagine what it is.

#### 149. ADMINISTRATIVE REORGANIZATION BY CONSTITUTIONAL AMENDMENT

The usual method of state administrative reorganization has been through legislative enactment, without constitutional change. This has been due largely to the difficulty of altering the state constitutions. This method, however, in most states would be inadequate, because without constitutional change the reorganization is likely to be incomplete. Consequently, we find that Massachusetts and New York have deemed it desirable to adopt constitutional amendments as the basis of reorganization. The Massachusetts amendment is brief while that of New York is more detailed, but in both cases they have to be supplemented by legislation.

##### a. The Massachusetts Amendment

[Art. LXVI of Amendments to Constitution of Massachusetts, adopted November 5, 1918. *Manual for the General Court, 1925-26*, pp. 117-118.]

On or before January first, nineteen hundred twenty-one, the executive and administrative work of the commonwealth shall be organized in not more than twenty departments, in one of which every executive and administrative office, board and commission, except those officers serving directly under the governor or the council, shall be placed. Such departments shall be under such supervision and regulation as the general court may from time to time prescribe by law.

##### b. The New York Amendment

[Art. V of Constitution of New York as amended November 3, 1925. *New York Legislative Manual, 1927*, pp. 118-121.]

*Comptroller and Attorney-General.*—Section 1. The Comptroller and Attorney-General shall be chosen at a general election, at the time and places of electing the Governor and Lieutenant

Governor, and shall hold office for the same term as the Governor and Lieutenant Governor. The Comptroller shall be required: (1) To audit all vouchers before payment and all official accounts; (2) to audit the accrual and collection of all revenues and receipts; and (3) to prescribe such methods of accounting as are necessary for the performance of the foregoing duties. In such respect the Legislature shall define his powers and duties and may also assign to him supervision of the accounts of any political subdivision of the State, but shall assign to him no administrative duties, excepting such as may be incidental to the performance of these functions, any other provision of this Constitution to the contrary notwithstanding. Each of the officers in this article named shall, at stated times during his continuance in office, receive for his services a compensation which shall not be increased or diminished during the term for which he shall have been elected; nor shall he receive to his use any fees or perquisites of office or other compensation.

*Departments and State Government.*<sup>1</sup>—§ 2. There shall be the following civil departments in the State Government: First, Executive; second, Audit and Control; third, Taxation and Finance; fourth, Law; fifth, State; sixth, Public Works; seventh, Architecture; eighth, Conservation; ninth, Agriculture and Markets; tenth, Labor; eleventh, Education; twelfth, Health; thirteenth, Mental Hygiene; fourteenth, Charities; fifteenth, Correction; sixteenth, Public Service; seventeenth, Banking; eighteenth, Insurance; nineteenth, Civil Service; twentieth, Military and Naval Affairs.

*Assignment of functions.*—§ 3. At the session immediately following the adoption of this article the Legislature shall provide by law for the appropriate assignment, to take effect not earlier than the first day of July, one thousand nine hundred and twenty-six, of all the civil, administrative and executive functions of the State Government, to the several departments in this article provided. Subject to the limitations contained in this Constitution, the Legislature may from time to time assign by law new powers and functions to departments, officers, boards or commissions continued or created under this Constitution, and increase, modify or diminish their powers and functions. No specific grant of power herein to a department shall prevent the Legislature from conferring additional powers upon such department. No new departments shall be created hereafter, but

<sup>1</sup> The number of departments was reduced to eighteen by chapter 343, Laws of 1926, effective January 1, 1927.

this shall not prevent the Legislature from creating temporary commissions for special purposes and nothing contained in this article shall prevent the Legislature from reducing the number of departments as provided for in this article, by consolidation or otherwise. The elective State Officers in office at the time this article as amended takes effect shall continue in office until the end of the terms for which they were elected. Pending the assignment of the civil, administrative and executive functions by the Legislature pursuant to the directions of this section, the powers and duties of the several departments, boards, commissions and officers now existing are continued. Subject to the power of the Legislature to reduce the number of officers, when the powers and duties of any existing office are assigned to any department, the officers exercising such powers shall continue in office in such department, and their term of office shall not be shortened by such assignment.

*Department heads.*—§ 4. The head of the Department of Audit and Control shall be the Comptroller and of the Department of Law, the Attorney-General. The head of the Department of Education shall be the Regents of the University of the State of New York, who shall appoint and at pleasure remove a Commissioner of Education to be the chief administrative officer of the department. The head of the Department of Agriculture and Markets shall be appointed in a manner to be prescribed by law. Except as otherwise provided in this Constitution, the heads of all other departments and the members of all boards and commissions mentioned in this article, excepting temporary commissions for special purposes, shall be appointed by the Governor by and with the advice and consent of the Senate and may be removed by the Governor, in a manner to be prescribed by law.

*Certain offices abolished.*—§ 5. All offices for the weighing, gauging, measuring, culling or inspecting any merchandise, produce, manufacture or commodity whatever, are hereby abolished; and no such office shall hereafter be created by law; but nothing in this section contained shall abrogate any office created for the purpose of protecting the public health or the interest of the State in its property, revenue, tolls or purchases, or of supplying the people with correct standards of weights and measures, or shall prevent the creation of any office for such purposes hereafter.

*Civil service appointments and promotions.*—§ 6. Appointments and promotions in the civil service of the State, and of all the civil divisions thereof, including cities and villages, shall be

made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late civil war, who are citizens and residents of this State, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section.

## 150. CRITICISM OF RECENT STATE REORGANIZATIONS

Plans of state administrative reorganization recently adopted in a number of states are based on the principle of one-man responsibility and control. This concentration of authority presupposes that popular control will thereby become more effective. This view, however, does not meet with universal agreement, as indicated by the following selections.

### a. Dogmas of Administrative Reform

[F. W. Coker, in *American Political Science Review*, vol. XVI, pp. 408-411 (Aug., 1922).]

. . . . .

The principles upon which this [Ohio] and other recent reorganizations are based are clear and familiar. There is, first, the principle of economy: save money and effort by eliminating duplication and overlapping of activity; save both in overhead expense and in clerical, inspectional, and other subordinate work, by bringing together into one large department agencies performing closely similar and closely interrelated functions. No serious exception can be taken to this principle. The only suggestion to be ventured here is this: it is possible that improvement in our state administration, by way of eliminating needless duplication and overlapping, can be achieved better by a piecemeal process—dealing particularly with each case of duplication—than by the more sweeping method of reconstruction followed by the recent reorganization acts.

Secondly, there is the more fundamental principle of concentration of power and authority: concentrate power in order to attract abler men to executive and administrative offices, in order to give freer rein to able men in office, and in order to secure an easier location of responsibility. The reorganization acts attempt

to obtain this concentration in two ways. First, place each main administrative department under a single director, so that there shall be no division of power and responsibility in the control of any such department. Second, give the governor complete control over each director by providing that each director shall serve at the pleasure of the governor, in order that public responsibility for the entire directing personnel of the administration may be inescapably fixed upon one conspicuous official, and also in order to make possible a unified executive policy or program and to facilitate coöperation among the different departments.

However appealing this theory of a unified, responsible executive may be, however valid the theory may be in certain of its applications, it may be subject to more substantial and radical qualifications than our leaders in administrative reconstruction are allowing. The points of challenge can be stated in only a brief, summary way, with the hope that they will receive more authoritative consideration than can be given them here.

First, in the matter of the single headed administrative department, is it true that for all such departments unity of power and responsibility is of more importance than continuity of policy and the maintenance of relations of mutual respect and confidence between head and staff? In the recent Ohio reorganization, have we not in too many instances sacrificed good of the latter sort in the effort to gain advantages of the former sort?

Secondly, are we not in danger of carrying too far the idea that popular control is advanced chiefly by placing vast powers in one elected officer, with the expectation that this officer will feel responsible so certainly fixed upon him that he will be more sensitive to public opinion than he would be if he possessed a narrower allotment of power? Are we not overlooking other equally potent incentives to good service—other incentives which may be weakened by this centralization of power? Are we not greatly exaggerating the ability of public opinion—even an intelligent and alert public opinion—to keep constant observance upon its representatives and to pass satisfactory judgment upon them periodically? In the last question there is reference to what may be a fundamental error of the advocates of the principles which we are examining—namely the assumption that popular control over executive officers is applied chiefly through the election and rejection of these officers at the polls. Popular control of the administration of law is not exercised principally through the popular selection and dismissal of executive officers, one or many. It is equally exercised in enacting directly or in-



directly a law determining a method of administration. It is an exercise of popular control to determine that we, the people, want our health or charitable services expertly rather than politically administered, and to determine that such administration in accordance with our desires is more likely to be obtained under a director selected by a continuing council than under a director subject to change every two or four years. Our state university and our local schools are administered as nearly in accordance with public opinion as is or will be our department of commerce. Is there any more reason for making a director of health or of public welfare, or of education, subject to change with every change of governor, in the interest of popular government, than to make the president of the state university changeable with each change of governor, or the local superintendent of public schools changeable at each mayoralty election? We, the voters, don't want to be consulted on such questions every two or four years. We believe that in the long run the schools will be administered more nearly in accordance with our needs and desires by not calling upon us to pass periodic judgment upon the matter. It may be doubted if either popular government or efficient government is likely to be advanced by placing the health or public welfare director completely under the control of the governor, or by subjecting the public utilities commission and the industrial commission to interference by directors under the control of the governor, or by transferring the peculiar services rendered by the old board of state charities to a director so controlled.

I am a strong believer in the short ballot principle insofar as it means the short ballot—that is the election of relatively few executive officials, popular election not being, in my opinion, a satisfactory method for choosing more than a very limited number of executive officials. I am ready to part company with the short ballot advocates if they contend that, in order to be consistent, we must place the entire control of our administration in the hands of one or a few officials changeable every two or four years. With the exception of the national government of the United States, a few cities of the United States (Pittsburgh, Boston, Cleveland, for example), and some Latin-American governments, no important government—national, district, or local—anywhere in the world is organized on the principles upon which many of our reformers of state and city government are defending their plans for consolidated executives.

These recent systems of reorganization give too little weight to such needs as the following: (1) The need of securing continuity

of policy in administrative departments having work of a technical and regulation-establishing character; (2) the need for facilitating the establishment of customs and traditions of non-interference by periodically changing political officers; (3) the need for eliciting the participation of disinterested citizens serving on unpaid boards, exercising powers of investigation, advice and publicity; (4) the need for placing legal authority and responsibility in the particular offices most likely to develop a sense of professional responsibility and pride in connection with the work of such offices; (5) the uselessness of extending the scope of power of any officer beyond the limits of what that officer can actually devote his attention to. Both reason and experience show that, for the administration of many functions, diffusion, rather than concentration, of authority, secures not only more efficient but also more democratic administration.

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### b. Inaugural Message of Governor Bryan [Neb.], 1923

[*Nebraska House Journal, Forty-Second Session, 1923*, pp. 87-88.]

*To the Members of the Forty-Second Session of the Legislature of Nebraska*

Gentlemen: . . .

My first recommendation deals with the form of government under which the state's affairs have been administered during the past four years and which was the central issue of the recent campaign, namely, the civil administrative code. From the time this measure was enacted, four years ago, until it was made the paramount issue of the recent campaign, the people endeavored to get a referendum that would permit them to express themselves by direct vote on this measure. The candidates for governor of the two major parties took their stand on opposite sides of the question whether the code system of government should be upheld or repealed. An analysis of the vote for governor in any or all of the legislative districts of the state can lead to only one conclusion, viz., the people demand that the code system of government be abolished.

The present code system centralizes in the chief executive all responsibility for not only executing the administrative policies of the state but also of determining all administrative policies, which include the very important and far-reaching banking matters and the bank guarantee fund operation, also the decision

as to public highway development projects, insurance administrative problems and other important functions. Such a centralization of power is unwise, unsafe as a business proposition, and fraught with danger to the general welfare of the people.

Under the provisions of the code system, the state officers, other than governor, are shorn of all but mere clerical authority, although it is physically impossible for the chief executive to be constantly available or prepared to confer and decide important policies coming up from the various code department secretaries, who are employees with no direct responsibility to the taxpayers. It seems to me that it is of utmost importance that the state constitutional officers be given authority to sit as an executive board at least once a week, and oftener when needed, to decide administrative policies and to stand as the people's representative between them and the organized business groups which are to be affected by the laws to be administered.

I do not believe public service or public business will be benefited by the creation of any executive officers in addition to the regularly elected state officers.

I therefore recommend the repeal of the civil administrative code and all amendments as quickly as possible, so that the reorganization work may be carried out without unnecessary delay.

In lieu of the present system I recommend that an executive board, consisting of the Governor, Secretary of State, State Treasurer, State Auditor, and Commissioner of Public Lands and Buildings, be created and that these officers constitute a board of review to be known as "The Executive Council," which shall have power by majority vote to determine the state's administrative policies. (I have not included the Attorney-General as a proposed member of this board for the reason that he must be its legal adviser, and, therefore, should not be required to take sides on any disputed or controverted question.)

The Governor is by the constitution made the supreme power to execute and administer the laws of the state. In order that there may be no shifting of responsibility for the execution of the state's administrative policies, and no divided authority over appointees and employees, it is my conviction that all department heads and needed employees should be appointed directly by the governor, and that the appointive power should also have the authority to remove any appointee at will.

I believe the government should be made more compact by curtailing and combining departments, by eliminating duplications of officers and employees connected with the administrative

work, and that all educational effort should be discontinued in the state's administrative departments and confined to the state's educational institutions to avoid duplication of effort and unnecessary expense.

When the code law is repealed, useless departments can be abolished, others consolidated so that the number of inspectors, bureaus, commissions and inspections can be greatly reduced and some inspections can be handled by local officials. When the regular state officers again assume the responsibility of recommending to the legislature the needed appropriations for the various state activities, the duplications, fads, theories and isms calling for an endless number of employees, and ever-increasing and unnecessary expenditures of the people's money, will cease.

The first step in restoring the government to a business basis is to repeal the code law. Second, regroup the state's necessary departments with authority in the governor to appoint the heads and necessary assistants, and with authority in the Executive Council to determine administrative policies. Third, re-enact separate statutes dealing with the subjects covered by the original enactments which the code superseded, so that the enforcement or administrative provisions thereof may be brought in harmony with the general administrative plan. . . .

CHARLES W. BRYAN.

## CHAPTER XXIV

### THE STATE JUDICIARY

#### 151. THE POSITION OF THE JUDGE

Two outstanding circumstances which determine the position of the American state judge are the method of his selection by popular vote and the comparatively narrow scope of his powers while in office. These circumstances leave him in a far from satisfactory position, which is feelingly described in the following selection, written by one who was himself formerly chief justice of the supreme court of North Dakota.

[Bruce, *The American Judge* (The Macmillan Company), pp. 1-3, 124-127, 193-194.]

No public official is more influential than the American judge; yet no official is more politically helpless. Paradoxical though it may seem, there is no one who is closer to, and at the same time further removed from, the mass of the American people. His duties are so arduous that he must of necessity be a student and a recluse. For fear that he may be charged with favoritism he must avoid even an appearance of undue intimacy with attorneys and with litigants. Even his right of friendship is limited; yet, and especially where the system of primary elections prevails, his position is preeminently political, and he is ever at the mercy of the politicians and of the powers behind the throne, whether those powers be popular, corporate, or democratic in the broader and higher sense of the term. In order to survive the ordeal of the primary elections, at which anyone can be a candidate, and at which every new aspirant may "gumshoe" for election, he should himself be popular and have a large public acquaintance; yet, without losing his self-respect and without degrading his office, it is almost impossible for him to become popular. . . .

And especially helpless is the elective judge of an American appellate court. He is the subject of frequent criticism; yet he has no popular forum and no adequate means of defense. He is both of the world and out of the world. He depends for election upon the public support and the popular suffrage; yet his office is so surrounded by tradition and dignity, and so careful must he be not to express an opinion in advance on questions which

later may come before him for judicial determination, that but rarely can he appear upon the public platform or defend himself or his decisions in the popular press. It is true that he has the law reports in which he may print his opinions; but these the general public never read. His position demands the highest wisdom. He should have the fullest opportunity for quiet thought and a complete freedom from petty annoyances; yet he has no opportunity for this thought and no freedom from these annoyances. . . .

The uncertain tenure of office of the American judges has had much to do with the delays and uncertainties in the administration of justice. Making the holder of the scales of justice a political football can hardly be promotive of judicial impartiality and of judicial equanimity.

Our democratic desire to maintain a popular and ever-present control over our courts and to give everyone a chance and an equal opportunity has made our state judiciary altogether too unstable and has resulted too often, not only in the election of incompetent and untrained judges, but in the denial, even to those who are competent, of an opportunity to familiarize themselves with their duties, to acquire the judicial mind, and to really settle in the harness. A judge needs to be trained as well as a trial lawyer, and the tenure of office is often too short to make this possible. A lawyer fresh from the active practice is rarely at first able to fill the judicial office with satisfaction and to adapt his method of thinking to his new position. In the past he has of necessity been an advocate and a partisan. Now he must be an arbiter and a judge. In the past he has been a specialist. Now he must interest himself in, and familiarize himself with, the whole field of the law. In the past his duty has been to talk. Now it is to listen. Formerly he was interested in the question of the legal possibility and the question whether a certain thing could be legally done. His immediate interests were those of his client. Now they are broader. Formerly he could get along and perhaps could succeed without any broad conception of social needs and of social aims. Now, if he would really serve his state, if he would really do justice to litigants and to the public alike, he must be conversant not merely with technical law but with history and economics and sociology. Often he has come to the bench totally unprepared for its duties and must begin, as it were, his professional training anew. What, for instance, does the personal injury specialist know of the rules of commercial law, or the criminal lawyer of the law of real estate? Yet the

judge must know all things. At his bar must be tried all classes of cases; in this age of specialization he alone is denied the right to specialize.

A government by law must find its foundation in a respect for its administrators. There never can be any large measure of respect for the American judge and for a government of law as long as the judicial primaries exist, and, in them, any lawyer, no matter how incompetent he may be, is able and willing to throw his hat into the ring. There can be no respect for the law as long as the candidates for the judicial office resort to the methods of the demagogue and of the ward heeler. A primary election system compels the judges who are already in office and who seek reelection to beg for votes, and no judicial officer who does so can be respected. The honorable refuse to do this and sooner or later the honorable usually fail of reelection. Something indeed is wrong when judges, such as Cooley of Michigan, Mitchell of Minnesota and McClain of Iowa are driven from the bench.

A sitting judge cannot possibly carry on a successful political campaign against an aggressive and conscienceless antagonist. He is supposed to administer the established law and he cannot promise to carry out the will of the temporary majority. A member of Congress or a candidate for the legislature, perhaps, can do these things. He can argue policies on the rostrum and on the stump and can promise to carry them out. He can dissertate at length on the achievements of himself or of his faction or party. He can pledge and he can promise. He can reward his friends. The judge, however, can promise nothing. He can reward no one. Justice should be blind. Even though his decisions are misquoted, the jurist has no means of defense. He cannot even conduct a campaign or ask others to do it for him. How can an honest judge ask men and factions and interests to work for him at election time when he knows that during the next month or year these men or factions or interests will have lawsuits in his court which he must pass upon and decide? A congressman or senator may, with a measure of personal honesty, be loyal to his supporters and to his friends; a judge must have no friends. . . .

In many states we have made our trial judges mere umpires and keepers of the peace, when it must be apparent to all that they will often be able to aid the jury greatly in the determination of their cases, and that the benefits that can be derived from their superior knowledge and training cannot profitably be ignored. This denial can only be due to a distrust of govern-

ment and of the judiciary which does not exist in England or in any of the British dominions, and which does not speak well of our selective methods. In these latter days the distrust has been augmented by the fact that by subjecting our judges to so many and so frequent elections we have taken from them much of their prestige. We have done all in our power to deprive them of their independence and to make them play at politics. It is difficult for a lawyer to respect a judge who in the past has asked for his support on election day, and it is asking much of a judge to reprimand or otherwise to curb the zeal of a lawyer on whose good graces his reelection may depend. The quite general efficiency and the almost universal probity of the American judiciary under these adverse circumstances, is something of which the American lawyer may well be proud and is a remarkable illustration of our national integrity; but we are playing with fire, and both in these matters and in the clamor for the judicial primary election and the judicial recall our impatient and distrustful democracy is working against its own best interests.

## 152. THE SELECTION OF JUDGES

As pointed out in the preceding extract, the election of judges by popular vote is subject to many objections. Many suggestions, both practical and theoretical, have been made for improving the method of selection. The following extracts, based upon careful consideration of actual conditions in a typical American metropolitan area, are among the most valuable of recent suggestions in this direction. The first extract is from the recent report of a committee of the Cleveland Bar Association embodying recommendations for changes in the method of selecting judges in Ohio which, although following in the main a plan previously suggested in other quarters, contains certain novel features.

### a. Recommendations of the Cleveland Bar Association Committee

[*Journal of the American Judicature Society*, vol. 10, pp. 178-179 (Apr., 1927).]

After studying the problems involved, a majority of the Committee is of the opinion that practically all the judges of the Ohio courts should be appointed and not elected, and that whatever changes in the law may be necessary to bring this about should be made.

This recommendation apparently involves the duty of formulating and recommending the particular method of selecting



judges, which, in the judgment of the Committee, is most likely to secure the best appointments for the respective courts.

A majority of the Committee accordingly submits to the Executive Committee the opinion that:

1. The judges of the courts of Ohio should be appointed and not selected by popular vote, except as noted below.

2. A plan for the selection of judges, substantially as follows, should be adopted:

- (a) The election of the chief justice of the supreme court by popular vote;

- (b) The appointment of associate judges of the supreme court by the governor, with the approval of two-thirds of the members of the Senate, or the approval of a judicial council selected by the Senate;

- (c) The appointment of judges of the appellate courts by the chief justice of the supreme court, with the approval of a majority of the associate judges of the supreme court;

- (d) The appointment of judges of all other courts by the chief justice of the supreme court, with the approval of a majority of the judges of the appellate courts for the respective districts within which the appointees are to serve;

- (e) Every judicial appointment to be for a term of six or eight years.

#### SUGGESTIONS IN SUPPORT OF RECOMMENDATIONS

All of the members of the Committee are well aware of the fact that it would be extremely difficult, if not impossible, to secure at this time the constitutional and statutory amendments necessary for the establishment of the system suggested. It is, however, the duty of the bar associations to take note of the faults and failures of the systems for selecting judges that have been given thorough trials and to press for the adoption of such methods as are believed to be the most reliable. The administration of justice is at best a difficult and delicate matter and any system that is known to be deficient should be readily discarded. Both the partisan system and the non-partisan ballot plan have been tried and found wanting. If there is any other that is better than these, or that gives promise of better results, it should be adopted. The defects and dangers of the non-partisan system, and especially of the right to nominate judicial candidates by petition, have been so fully demonstrated in Ohio in recent years as to make it unnecessary to submit arguments to a body of lawyers on the necessity for a change. We cannot recommend

a return to the old convention system, for that means the practical selection of judicial candidates by the managers of the leading political parties. Possibly some other shifts based on the elective system might be tried out, but why continue these experiments? We are entitled to a better and more logical system, and it is high time that we asked for it. The courts should not be kept in politics, either through political parties or through the activities of candidates who nominate themselves for judicial positions. Candidates for legislative and executive positions, rightfully enough, are required to subject themselves to political contests. They are generally supposed to represent certain policies and the voters have a right to know and compare the policies and purposes of the various candidates. But this is not, or should not be, true of judicial candidates. They should be chosen only on the basis of peculiar fitness for the respective judicial positions. The qualities desired are such that the selection of material is extremely difficult, especially in large centers of population. It is now generally conceded, and is apparent on the face of things, that it is not possible in large cities (and it is extremely difficult anywhere) for the average voter to know the facts that will enable him to select the best judicial material for the various courts.

In this matter it seems that we have pushed our democratic notions a little too far. Ours is about the only large country in the world in which judges are chosen by popular vote. We are very tolerant in the use of objectionable political machinery so long as it calls for the vote of the people. Fortunately at the time of the adoption of the Federal Constitution the appointive system was well known and was embodied in the Constitution, with the result that we have always had a much better federal judiciary than could have been secured by any possible system of popular elections. This undoubtedly accounts for the fact that these courts are not included in the general criticisms to which our courts are constantly being subjected.

There is now a general agitation in favor of the short ballot. This movement is based upon the principle that the best results can be secured by electing a few officials and placing upon them the responsibility for securing the proper administration of the laws through subordinates. We have learned the lesson that it is not possible for the average voter to keep in touch with the details of administration. It is only possible to select heads of departments and hold them responsible for results. In our opinion, this general idea should obtain most of all in adminis-

tering the judicial branch of the state government. There should be one general head in the judicial department—the chief justice of the supreme court. He should be kept in touch with all of the courts and should have some responsibility for the work of all. He should be responsible to the people and should therefore be elected by them for a reasonable term of years.

Generally speaking, the entire responsibility for the administration of justice should be upon the courts themselves. It can best be placed there if the power of selecting judges is entrusted to that department. This is one reason for the recommendations we are making. But another and stronger reason is that the courts have the best possible opportunities for observing and judging the work of the lawyers and for selecting from the ranks of the lawyers the best judicial timber. It is perhaps best that no court should select its own members. But there seems to be no valid reason why the chief justice, with the approval of the members of the supreme court, could not make the best possible selection of the appellate judges for the state, and why the chief justice, with the approval of the appellate courts of the respective districts in which vacancies occur, could not make the best possible selections for all courts inferior to the appellate courts. It is only by some such system as this that the maximum of responsibility for results can be placed upon the courts themselves, and it is only through some such system that the most intelligent selection of judges can be made. . . .

#### **b. Recommendations of Cleveland Survey of Criminal Justice**

[*Criminal Justice in Cleveland* (The Cleveland Foundation, 1922), pp. 364–365.]

It is the consensus of opinion of the bar and the unanimous conviction of the ablest students of our legal institutions that strong and well-qualified judges are most certainly secured when they are appointed by the Executive and hold office for life, subject, of course, to removal for misconduct. On the evidence, there is every reason to believe that this method of selection, or a modification of it, plus long tenure, would do more than anything else to revolutionize the present state of affairs. If it be within the field of possibility, this is unquestionably the goal to be striven for. On the other hand, one cannot ignore the fact that in this matter, as in matters affecting standards of admission to practice, the bar does not seem to possess public confidence and is unable to gain acceptance of its views. On this point there

is a gulf of misunderstanding between laymen and lawyers that has not been bridged. The body of the people seem determined to retain the power of selecting their judges, and wherever that is so, the only practical step is to make the elective system operate at its maximum possible efficiency.

Within the limits insisted on by the democratic impulse much can be done. Almost every conceivable method of selecting judges has been tried in the various States and, as Dean James Parker Hall made clear in his address before the Ohio Bar Association in 1915, each method can point to a success in some State. As an extreme illustration, judges are elected in Vermont by the legislature for two-year terms. Theoretically this is as bad a plan as could be devised; but actually in Vermont good judges are chosen and hold office for life. Popular election of judges has done splendidly in Wisconsin, where the tradition has grown up of steadily reëlecting the judges.

The secret in obtaining good judges is that back of the method—whatever it is—there must be a tradition which makes the selecting group realize that it is clear public policy to retain judges in office except for grave mental, moral, or physical defects. This tradition has been built up in New York, Wisconsin, Vermont, Connecticut, and elsewhere, but seems not to exist in Cleveland (with the exception, strangely enough, of the Probate Court), and it cannot be secured overnight. Its growth may, however, be aided.

To that end the following principles should be incorporated into the elective system, if that is to be retained in Cleveland. Judges in first instance should be elected as they are now. Their first term should be comparatively short, say, six years. At the end of that time they should run for reëlection for a longer term of, say, ten or twelve years, and for this purpose they should run *against their own record*, not against a motley group of other candidates. In other words, the voters decide a plain issue: Shall the judge be retired or shall he be retained? The third term should be even longer and consist of, say, twenty years. In the event of the retirement of a judge a special election, in which he could not be a candidate, would be held.

Such a plan will reduce very greatly the amount of electioneering and the constant interruption of judicial work thereby occasioned. For a judge to run against his own record is infinitely less degrading than the scramble for votes in the open field. The question of reëlection or retirement will be an issue

of moment and on it all the responsible agencies in the community can focus their attention.

The tendency will clearly be to retain judges in office; the average tenure will be substantially longer. The enormous advantage of the longer tenure is this: There is a splendid tradition of service, the heritage of centuries, which attaches to the judicial office and which elevates every man who takes the oath of that office. This tradition, constantly at work, plus the experience gained as the years go by, takes inferior men, if need be, and develops them into superior judges.

The method suggested in no respect deprives the community of its right to select its own servants and to discharge those with whom it is dissatisfied. For that reason it is a feasible method. And, as it is calculated to make the method of popular election operate at maximum instead of mediocre efficiency, it would give results.

### 153. THE DELAYS OF THE LAW

In the following passage, former President Taft, now Chief Justice of the Supreme Court of the United States, eloquently describes some of the defects in the administration of justice, especially the delays of the law which operate with such great inequality as between the rich and the poor. Similar charges have been made in other quarters, but Chief Justice Taft's animadversions carry the greater weight because he can hardly be accused of prejudice against the judiciary.

[*Central Law Journal*, vol. 72. pp. 193-195 (Mar. 17, 1911).]

I venture to think that one evil which has not attracted the attention of the community at large, but which is likely to grow in importance, as the inequality between the poor and the rich in our civilization is studied, is in the delays in the administration of justice between individuals. As between two wealthy corporations, or two wealthy individual litigants, and where the subject matter of the litigation reaches to tens and hundreds of thousands of dollars, where each party litigant is able to pay the expenses of litigation, large fees to counsel, and to undergo for the time being the loss of interest on the capital involved, our present system, while not perfect, is not so far from proper results as to call for anxiety. The judges of the country, both state and national, are good men. Venality in our judges is very rare; and while the standard of judicial ability and learning may not always be as high as we should like to see it, the provi-

sions for review and for free and impartial hearing are such as generally to give just final judgments. The inequality that exists in our present administration of justice, and that sooner or later is certain to rise and trouble us, and to call for popular condemnation and reform, is in the unequal burden which the delays and expense of litigation under our system imposes on the poor litigant. In some communities I know, delays in litigation have induced merchants and commercial men to avoid courts altogether and to settle their controversies by arbitration, and to this extent the courts have been relieved; but such boards of arbitration are only possible as between those litigants that are members of the same commercial body, and are in a sense associates. They offer no relief to the litigant of little means who finds himself engaged in a controversy with a wealthy opponent, whether individual or corporation.

The reform, if it is to come, must be reached through the improvement in our judicial procedure. In the first place, the codes of procedure are generally much too elaborate. It is possible to have a code of procedure simple and effective. This is shown by the present procedure in the English courts, most of which is framed by rules of court. The code of the State of New York is staggering in the number of its sections. A similar defect exists in some civil law countries. The elaborate Spanish code of procedure that we found in the Philippines when we first went there could be used by a dilatory defendant to keep the plaintiff stamping in the vestibule of justice until time had made justice impossible. Every additional technicality, every additional rule of procedure adds to the expense of litigation. It is inevitable that with an elaborate code, the expense of a suit involving a small sum is in proportion far greater than that involving a large sum. Hence it results that the cost of justice to the poor is always greater than it is to the rich, assuming that the poor are more often interested in small cases than the rich in large ones—a fairly reasonable assumption. . . .

It may be asserted as a general proposition, to which many legislatures seem to be oblivious, that everything which tends to prolong or delay litigation between individuals, or between individuals and corporations, is a great advantage for that litigant who has the longer purse. The man whose all is involved in the decision of the lawsuit is much prejudiced in a fight through the courts, if his opponent is able, by reason of his means, to prolong the litigation and keep him for years out of what really belongs to him. The wealthy defendant can almost al-

ways secure a compromise or yielding of lawful rights because of the necessities of the poor plaintiff. Many people who give the subject hasty consideration regard the system of appeals, by which a suit can be brought in a justice of the peace court and carried through the other courts to the supreme court, as the acme of human wisdom. The question is asked: "Shall the poor man be denied the opportunity to have his case re-examined in the highest tribunal in the land?" Generally the argument has been successful. In truth, there is nothing which is so detrimental to the interests of the poor man as the right which, if given to him, must be given to the other and wealthier party, of carrying the litigation to the court of last resort, which generally means two, three and four years of litigation. Could any greater opportunity be put in the hands of powerful corporations to fight off just claims, to defeat, injure or modify the legal rights of poor litigants, than to hold these litigants off from what is their just due by a lawsuit for such a period, with all the legal expenses incident to such a controversy. Every change of procedure that limits the right of appeal works for the benefit in the end of the poor litigant and puts him more on an equality with a wealthy opponent. It is probably true that the disposition of the litigation in the end is more likely to be just when three tribunals have passed upon it than when only one or two have settled it; but the injustice which meantime has been done by the delay to the party originally entitled to the judgment generally exceeds the advantage that he has had in ultimately winning the case.

Generally in every system of courts there is a court of first instance, an intermediate court of appeals and a court of last resort. The court of first instance and the intermediate appellate court should be for the purpose of finally disposing in a just and prompt way of all controversies between litigants. So far as the litigant is concerned, one appeal is all that he should be entitled to. The community at large is not interested in his having more than one. The function of the court of last resort should not primarily be for the purpose of securing a second review or appeal to the particular litigants whose case is carried to that court. It is true that the court can only act in concrete cases between particular litigants, and so incidentally it does furnish another review to the litigants, in that case; but the real reason for granting the general principles of law for the benefit and guidance of the review should be to enable the supreme court to lay down general principles of law for the benefit and

guidance of the community at large. Therefore, the appellate jurisdiction of the court of last resort should be limited to those cases which are typical and which give to it in its judgment an opportunity to cover the whole field of the law. This may be done by limiting the cases within its cognizance to those involving a large sum of money, or to the construction of the Constitution of the United States or the states or their statutes. The great body of the litigation which it is important to dispose of, to end the particular controversies, should be confined to the courts of first instance and the intermediate appellate courts. It is better that the cases be all decided promptly, even if a few are wrongly decided. . . .

## 154. THE REFORM OF JUDICIAL PROCEDURE

Many defects in the administration of justice, both civil and criminal, exist, which have led to widespread dissatisfaction and to a movement for judicial reform. Scientific surveys by competent observers have been made of the judicial systems in certain states and cities, resulting in recommendations for improvement. The first of the following selections deals in a general way with certain specific reforms, such as the unification of courts, the establishment of judicial councils, and the conferring upon the courts of rule-making power. The second selection is a summary of the recommendations of the Missouri Crime Survey regarding the reform of criminal procedure, written by former Governor Herbert S. Hadley of Missouri, who is recognized as one of the leading authorities in the country upon this subject.

### a. Problems of Judicial Reform

[Callender, *American Courts: Their Organization and Procedure* (McGraw-Hill Book Company), pp. 224-230.]

**Unification of Courts.**—It requires no very profound study to convince one that the court systems in many of the American states are needlessly complex. This is particularly true with respect to the judiciaries of the older states, and it is also noticeable in some of the other large or populous ones. The explanation is, for the most part, historical.

In the olden days when population was sparse and commercial activity of small dimensions, the needs of litigants were supplied by a small number of courts. As time passed, more facilities became necessary, and the legislatures were asked to provide them. Sometimes they enlarged the size of existing courts by increasing the number of judges, but frequently they created new and independent tribunals in a more or less haphazard manner. In some cases new courts were established to take over



certain of the functions exercised by the old courts; in other instances the new courts were designed to assume a similar type of jurisdiction, except as to the monetary limits of suits brought; in still other cases the new courts were given a jurisdiction substantially concurrent with existing ones. These methods, if they may properly be called methods, were sometimes followed with regard to all of the three main divisions of courts—the minor judiciary, the trial courts, and the courts of appeals. As a consequence there are today in some states two or more separate and independent courts of appeal, three or more separate and distinct courts of original jurisdiction in each county, and two or more distinct types of minor tribunals in particular counties or cities of the state. Considering that oftentimes there are several independent trial courts with exactly the same jurisdiction within a given city, and that there are sometimes dozens of justices' courts within the same area, it can be seen what a cumbersome system a lack of foresight has created.

The objections to such a galaxy of courts are several. In the first place, such an elaborate system involves a very wasteful expenditure of public money. Usually it is necessary that separate court rooms be provided; that a complete staff of court officials be employed, and that a complete system of court records be maintained for each court. These things mean a duplication of equipment oftentimes without any compensating benefits to the community. A more serious evil, however, is the effect which a complicated system of independent courts has upon the conduct of litigation. The worst phase of the matter is the endless number of jurisdictional questions which are presented because of it. There is great difficulty in determining whether a certain civil suit or criminal prosecution should be brought in a county, municipal, or justice's court, or perhaps in a municipal, common pleas, or district court, or whether an appeal should be taken to a circuit, superior, or supreme court, and so on. If the lawyer makes a wrong selection, the case is thrown out and has to be begun all over again. The case is delayed and additional expense is incurred because there is no method whereby the preliminary proceedings can be saved by a simple transfer of the case from one court to another. The courts are virtually strangers, and each insists that its own procedure be carefully observed. The decentralized system furthermore results in serious inequalities in the distribution of work among the various courts. Some judges are idle during parts of the year, while others are struggling hopelessly with more business than they are able to handle.

One remedy for the situation described lies in the unification and consolidation of the entire judicial structure of the state. This subject has received considerable attention in recent years, and it is being quite widely advocated. The general principles which should be followed in a program of unification were well stated some years ago in a report prepared by a committee of the American Bar Association. The introductory statement is as follows:

The whole judicial power of each state, at least for civil causes, should be vested in one great court, of which all tribunals should be branches, departments, or divisions. The business, as well as the judicial administration, of this court should be thoroughly organized so as to prevent not merely waste of judicial power, but all needless clerical work, duplication of papers and records, and the like, thus obviating expense to litigants and cost to the public.

The plan suggested is that the whole judicial power be concentrated in one court having three chief branches: (1) county courts, having exclusive jurisdiction of all petty causes, all of them to constitute in the aggregate one branch, with numerous local offices where papers may be filed, and as many places for the hearing of causes in each county as the exigencies of business may require; (2) a superior court of first instance in each county, having general original jurisdiction at law, in equity, in probate, and in kindred matters, the court to be divided into appropriate divisions for each class of business; (3) a single ultimate court of appeals, with such branches as are necessary for the transaction of different types of business or for sessions in different parts of the state.

It is recommended that supervision of the business administration of the whole court be committed to one high official of the court, who would be responsible for failure to utilize the judicial power of the state effectively. He should have power to assign judges to particular branches or localities as the necessities of litigation might require. He should also have authority, subject to general rules, to assign or transfer causes for hearing to different courts, and to equalize the amount of business in each. It is also suggested that each main division of the court be placed in charge of a judge, with supervisory control similar to that to be exercised by the chief judicial officer of the state and subject to the supervision of the latter. In brief, it is proposed that the courts be consolidated in such a way that there shall be a centralized control of the judicial and business administration of

the entire court system, to the end that all court business may be dispatched in an orderly and efficient manner. It is suggested that the legislation carrying the plan into effect lay down the general principles to be followed, but leave the details to rules of court to be devised, altered, and improved as experience may dictate.

The unified court plan needs only to be stated to make its advantages apparent. It should not be thought, however, that there is any finality in the particular scheme outlined. The important thing is that the general principle be recognized. The details must necessarily depend upon the local situation in a particular state. Furthermore, it may be that such a radical revision of a state's judiciary is more than may reasonably be expected, considering the constitutional difficulties and the many interests which would be disturbed. It is, however, an ideal worthy of careful consideration.

**Judicial Councils.**—A less ambitious project than the unified court system, but one having a somewhat similar objective, is the judicial council. The idea of a council, composed of judges and lawyers, to promote judicial reform is a comparatively recent one in the United States, but in the last few years it has spread all over the country. The inspiration was derived from the success of the English Rule Committee, established originally by the Judicature Act of 1875, and subsequently remodeled into an excellent instrumentality for promoting the efficient administration of justice. The plan seems to offer a practical basis for action and to hold out prospects for the accomplishment of many desirable reforms.

A judicial council is a body of men organized for the study of procedural problems and for adopting measures to bring about a better system of administering justice. As a rule, the council is established by legislative action, and the statute prescribes its organization, powers, and duties. Generally, the chief justice of the state is made chairman; the other members are appointed either by the chief justice or the governor, and include one or more justices of the highest court, several judges of inferior courts, and several representatives of the bar. As a rule, the members serve without compensation, but they are usually supplied with a salaried secretary. The expenses of the council are paid by the state.

The functions and duties of the judicial council may be summarized as follows:

1. To initiate investigations and gather statistical information

concerning the conditions existing in the various courts of the state as respects the disposition of judicial business.

2. To study the organization of the state judiciary and the rules of procedure under which the various courts operate, including the statutory provisions on the subject and the methods used in practice.

3. To receive and consider suggestions from judges, public officials, lawyers, and others concerning defects in the administration of the law and means for its improvement.

4. To prepare reports concerning the facts found, and to make recommendations concerning methods to be adopted in correcting existing faults, and to submit such reports to the legislature as a basis for future action.

5. To submit suggestions to the several courts concerning ways of promoting uniformity of practice and of expediting judicial business.

For the purpose of enabling the council to accomplish the various matters stated, it is usual for it to be authorized to order the production of evidence and to compel the attendance of witnesses.

The advantages of the judicial council are evident. In the first place, it provides the means for a continuous, thorough, and scientific study of defects in procedure, and this is a thing which has long been needed. In the second place, the distinguished and representative character of the council makes possible an authoritative opinion on the condition of affairs existing in the courts, and insures a careful consideration of recommendations made for improving these conditions. Finally, the council plan fixes responsibility for results and places it upon men who are best qualified by training and experience to assume it. The extent to which the movement has already progressed seems to indicate that the judicial council will be one of the principal agencies for legal reform in the future. The experiment is of too recent development to permit any definite conclusions as to its success. It appears, however, to promise results of great importance.

**Rule-making Power.**—It has been many times pointed out that one important reason why American courts fail to function efficiently is that the courts have too little control over the rules which regulate the conduct of litigation. Under the common law the courts were considered to possess this power and, theoretically, they do today, but in practice their authority is very much restricted by statutory provisions. In America generally,

the policy has been adopted of regulating matters of procedure by detailed practice acts which leave to the courts very little discretion in directing the conduct of their own particular business. It has been assumed that it is possible for a legislature to prescribe a fixed code of procedure which will answer the needs of every type of litigation and provide the means for handling every kind of problem which may arise in the courts. The assumption is an erroneous one and contrary to all judicial experience.

The results are unfortunate. It has relieved the courts of all responsibility for handling their business expeditiously and deprived them of all initiative in devising new methods for improving procedure. The court has become a sort of passive agent for dispensing remedies, rather than an active instrumentality for administering justice. Also, it has deprived the public of ability to fix responsibility for the state of affairs on any particular persons. The courts can refute the charge of laxity by asserting that they are merely doing what they are directed to do, and the legislature is too indefinite an aggregation to be held for anything. There the matter rests.

Again, the inspiration has come from England. In that country they long ago adopted the plan of regulating the conduct of litigation by rules of court, with only such statutory provisions as were necessary to create a proper basis for action. The English Rule Committee, composed of eminent judges and lawyers, is now responsible for the making of all changes in the details of court procedure. The results have been to make English procedure a model for the whole world.

The necessities of the situation are making themselves felt in the United States. There is now a great deal of discussion concerning the rule-making power. It is proposed by some authorities that the power be placed in the newly devised judicial councils, and by others, that it be placed in separate committees on rules composed, of course, of judges and lawyers. Doubtless, either method will, if adopted, bring about a definite improvement in the present situation. What must be provided is a definite responsible body of experts whose business it shall be to make a study of the rules of procedure, to make changes as conditions warrant, and to keep a constant watch on the situation thereafter. It will be necessary, however, for the legislatures to relinquish their present control over the matter to a very considerable degree. Unless they do so, the methods of procedure

will remain static and the courts will remain bureaucratic and inefficient.

### b. Reform of Criminal Procedure

[*The Missouri Crime Survey* (The Macmillan Company), pp. 358-373.]

#### FUNDAMENTAL CHANGES IN PROCEDURE

Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate, or other judicial officer, and, after being informed as to his rights, shall be given an opportunity publicly to make any statement and may answer any questions regarding the charge. . . .

Prosecution for crime may be either by indictment or information. It will be sufficient in either case to name or otherwise state the offense to be charged. The court, for good cause shown, shall require the filing of a bill of particulars. . . .

The defendant and the state shall be entitled to legal process to secure the attendance of witnesses and each may, if the presence of a witness cannot be secured, take the deposition of such witness whether within or without the state, under such conditions to be fixed by the court as will protect the rights of the defendant. Both the state and the defendant may use the testimony of any competent witness who has testified at any hearing of said charge, providing said testimony was given in the presence of the defendant with an opportunity for him to cross-examine such witness. The court may also under such conditions as will protect the rights of the defendant permit the state or the defendant to take the deposition of a witness within its jurisdiction, upon a showing that said witness is likely to leave said jurisdiction before the trial of said case. . . .

The defendant shall be a competent witness in his own behalf and if he testifies shall be subject to cross-examination as any other witness. If he fails to testify as a witness, his failure to do so may be commented on by the court and counsel in their statements to the jury. . . .

The defendant shall be presumed to be innocent of the offense charged, and the indictment or information shall not be considered as evidence of guilt, but the effect of this presumption shall be only to place upon the state the burden of proving him guilty beyond reasonable doubt, and court shall so instruct the jury. . . .

In the conduct of the trial, including the examination of wit-

nesses, the judge shall have the same powers as at common law. He shall instruct the jury as to the law applicable to the case and in said instructions may make such comments on the evidence and the testimony and character of any witness as, in his opinion, the interests of justice may require—provided, however, that the failure of the court to instruct on any point of law shall not be ground for setting aside a verdict of the jury unless such instruction is requested by the defendant. Such instructions and comments by the trial court shall be reduced to writing, before delivery, unless a stenographic record is made at the time of delivery. . . .

In all felony cases a five-sixths verdict of a jury shall be sufficient to convict, except in cases where death may be the penalty imposed, and in which cases the verdict of the jury must be unanimous. In misdemeanor cases triable before a jury the jury shall consist of six, and a five-sixths verdict shall be sufficient to convict. The defendant, in any case except where the death penalty may be imposed, may waive a trial by jury and have the case tried by the court. In all jury trials, only the question of guilt shall be decided by the jury, and the trial judge shall fix such punishment as may be authorized by law. Before sentence the judge shall be advised of the defendant's criminal record so far as obtainable, and may seek information as to his mental condition.

A defendant shall have the right to appeal to an appellate court following a verdict and judgment of guilty. The appellate court shall, on appeal, in addition to the issues raised by the defendant, consider and pass upon all rulings of the trial court adverse to the state which it may be requested to pass upon by the prosecuting officer of the county or the Attorney-General of the state. The state may also prosecute an appeal by the prosecuting officer or by the Attorney-General of the state from any adverse rulings or decision of the trial court, except a verdict and judgment of not guilty. On the hearing of an appeal a judgment of conviction shall not be reversed on the ground of misdirection of the jury or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the appellate court, after an examination of the record before the court it shall appear that the error complained of has resulted in a miscarriage of justice.

The appellate court may call witnesses or receive affidavits in reference to any controverted question of fact relating to the procedure in the trial, or may call upon the trial court to ex-

amine into and correct a statement in reference to such matter of procedure. In all appeals, typewritten transcripts of the record and typewritten briefs may be used by permission of the appellate court. In case the appellate court considers the punishment fixed is excessive, it may reduce the same without remanding the case for new trial.

In all capital cases, the record must be reviewed by the highest court of appeal. If the defendant be found indigent by the trial court, the expense of the appeal, together with a reasonable attorney fee to be fixed by the court, shall be paid by the county in which the crime was committed. . . .

After an indictment has been returned or an information filed in a court of record, there shall be no nolle prosequi entered except on a written statement of the prosecutor, giving his reasons therefor. If, in the opinion of the trial court, such reasons are not sufficient to justify such action, the judge can refuse to enter said dismissal or he can make further investigation as to whether such case should be prosecuted. If the trial judge decides that such prosecution shall continue, he shall have the authority, if he thinks the interests of justice require it, to appoint a special prosecutor to conduct said case. . . .

A. Whenever a person under indictment desires to offer a plea of insanity he shall present such plea ten days before trial or such time thereafter as the court may direct.

B. If a defendant when brought to trial for a criminal offense appears to the court to be or is claimed by his counsel to be insane, so that he cannot understand the proceedings against him or assist in his defense, the question of his sanity shall first be determined and if he is found to be insane he shall not be tried, but shall be confined in a proper institution. If later he is found to be sane, he shall then be brought before the court on the original charge and the prosecution shall not be prejudiced by such lapse of time.

C. Whenever in the trial of a criminal case the defense of insanity at the time of the commission of the criminal act is raised, the judge of the trial court may call one or more disinterested qualified experts, not exceeding three, to testify at the trial and if the judge does so, he shall notify counsel for both the prosecution and defense of the witnesses so called, giving their names and addresses. On the trial of the case, the witnesses so called by the court may be examined by counsel for the prosecution and defense. Such calling of witnesses by the court shall not preclude the prosecution or defense from calling other expert wit-



nesses at the trial. The witnesses called by the judge shall be allowed such fees as, in the discretion of the judge, may seem just and reasonable, having regard to the services performed by the witnesses. The fees so allowed shall be paid by the county where the indictment was found.

D. Whenever in any indictment or information a person is charged with a criminal offense arising out of some act or omission, and it is given in evidence on the trial of such person for the offense that he was insane at the time when the alleged act or omission occurred, then if the jury before whom such person is tried concludes that he did the act or made the omission, but by reason of his insanity was not guilty according to law for the crime charged, then the jury shall return a special verdict that the accused did the act or made the omission but was not guilty of the crime charged by reason of his insanity.

E. When the special verdict provided for in Section D is found, the court shall immediately order an inquisition to determine whether the prisoner is at the time insane, so as to be a menace to the public safety. If it is found that the prisoner is not insane as aforesaid, then he shall be immediately discharged from custody. If he is found to be insane as aforesaid, then the judge shall order that he be committed to the state hospital for the insane to be confined there until he has so far regained his sanity, that he is no longer a menace to the public safety. . . .

## 155. NEW DEVELOPMENTS IN THE ADMINISTRATION OF JUSTICE

In previous selections, some account has been given of the various defects in the administration of justice which cause delay, expense, and inconvenience to various classes of litigants to such an extent in many cases as to amount to a denial of justice. Members of the bench and bar are naturally conservative and having become accustomed to the system as it exists, however cumbrous, are loath to make a change. Nevertheless, the force of public opinion is gradually compelling the introduction of methods better adapted to the needs of litigants, involving changes partly within the regular judicial organization and partly outside of it. Among these new developments may be mentioned small claims courts, conciliation, arbitration, administrative tribunals, and declaratory judgments.

### a. Small Claims Courts

[Reginald Heber Smith, *Justice and the Poor* (Carnegie Foundation for the Advancement of Teaching, Bulletin No. XIII, 1919, published by Charles Scribner's Sons), pp. 41-42, 52-56.]

The inability to provide justice in small causes has always been

one of the weakest points in our system of administering justice. From the days of ordeal by battle, the method provided by the common law for proving and reducing to judgment any type of small claim has been cumbersome, slow, and expensive out of all proportion to the matter involved. Our legal system has taken too literally the ancient maxim, "*de minimis non curat lex.*" A complicated procedure requires the attorney, but the expense for his services is more than the traffic can bear. It was once asked at a meeting of the American Bar Association whether a lawyer in suing for seven dollars wages due his client, a blacksmith, was justified in charging a fee of half that amount. The question reveals the common dilemma—the services were worth the amount charged and yet, to the blacksmith, it would hardly be satisfactory to collect seven dollars at a cost of three dollars and a half. As Dean Pound puts it:

"For ordinary causes our contentious system has great merit as a means of getting at the truth. But it is a denial of justice in small causes to drive litigants to employ lawyers and it is a shame to drive them to legal aid societies to get as charity what the state should give as a right."

Similarly, court costs constitute an expense prohibitory to small litigation. The man hired at fifteen dollars a week who is put off the first week and not paid the second has a valid claim for thirty dollars but often not a dollar in his pocket. In addition to an attorney's fee, he cannot pay court costs because he has not been paid, and yet because he has not been paid court action is imperative. It is indeed a vicious circle, but within that circle thousands of unpaid wage-earners have been caught.

Delay plays its part by permitting a debtor, who has no real defence, to file an appearance and answer and interlocutory motions, to have the case continued once or twice, and then, when it is finally called for trial, to default. This serves to hold the plaintiff off for months, to cause him loss of time in court attendance, and to rob the ultimate judgment of much of its worth.

Small tradespeople to-day are forced to the practice either of wiping all small claims off their books or of selling them at a ridiculous discount to professional collection agencies. They have the possible relief of increasing the price of the necessities they sell, thereby adding the waste of the judicial system to the cost of living. The wage-earner and the small lodging-house-keeper, under conditions of modern competition, have not even that relief; they have been obliged to stand their losses. . . .

This deplorable condition is not the result of the evil machinations of any group or class; it is the consequence of the failure of the judicial system to keep pace with the changing conditions of life. In our judicial history small cases were first entrusted to justices of the peace. This plan for a while gave simplicity and despatch, but when applied to cities it failed utterly. The justices, being subject to no supervision, and depending so much on their fees that J. P. came to mean "Judgment for the Plaintiff," formed unholy alliances with collection agencies, instalment houses, and the like, and very generally became actually corrupt. They were so strongly entrenched in local politics that the process of ousting them, which is not yet completed, has been long and difficult. They have aptly been called "those barnacles of jurisprudence" because they have clung on long after their usefulness expired.

In the cities, the justice of the peace was first supplanted by specially created magistrates who, as the cities continued to grow, became just as inefficient and even more corrupt. Finally, they were succeeded by the organized modern municipal court of the type that is now familiar. With the municipal court came honest, trained, and capable judges, but also there came the rules of pleading, of procedure, and of evidence. Honesty and certainty were secured at the sacrifice of simplicity and speed. There has been a steady tendency to increase the jurisdictions of the municipal courts so that they have lost sight of the little cases; expense and delay have been allowed to creep in, with the result that small claims have not been cared for satisfactorily.

In a few communities the last and logical step has been taken of combining the simplicity, speed, and cheapness which were sought in the justice of the peace plan with the honesty and efficiency of the municipal court by a new type of court termed variously "small claims court," "small debtors' court," "conciliation court," and "court for small causes." The name of "small claims court" is the most descriptive and, to avoid confusion, will hereafter be applied to all such courts. . . .

These four types of small claims courts have amply demonstrated that as to small civil causes the defects of the traditional administration of justice can easily be eliminated. In these courts delay is entirely absent. Costs, either through reduction or abolition, cease to forbid access to the courts. The fundamental difficulty of the expense of lawyers is avoided by a simplicity of pleading and procedure in which there is no need for any attorney. The accruing advantage of having the parties

brought into direct contact with the judge, of making justice seem a more real thing to the average man with its resultant beneficial effects on good citizenship and loyalty can be only mentioned here. The small claims courts are a mighty force in revising the present day opinion of the humbler classes as to law and courts.

Second, the proceedings must be conducted without lawyers. Only in this way can the simplicity of procedure be maintained and the prohibitive expense of lawyers' services be eliminated. On all the evidence there seems to be no danger in informality of procedure in these small cases. . . .

The third principle is that while procedural law can be cast aside, rules of substantive law must be adhered to. This is the situation at present and in future extensions of the idea it cannot safely be departed from. In other words, while the small claims courts clearly demonstrate that the doing of justice is not dependent on religious observance of our traditional rules of procedure and evidence, they do not at all invalidate or weaken the principle that justice is best done when it is ascertained and administered by a trained judge, according to the rules of substantive law. . . .

The essential features of a small claims court are extremely low costs or none at all, no formal pleadings, no lawyers, and the direct examination of parties and witnesses without formality by a trained judge who knows and applies the substantive law. . . .

## b. Conciliation

[Reginald Heber Smith, in *American Bar Association Journal*, vol. 9, pp. 746-747 (Nov., 1923).]

### 1. THE NATURE OF CONCILIATION

The purpose of conciliation is to secure peace. We are not discussing international conciliation, or conciliation in collective disputes between capital and labor—this needs to be underlined and kept in mind. We are considering conciliation as applied to the ordinary, everyday disputes between men, those individual controversies—contracts, debts, claims for damages, etc.—that today can be settled only by litigation in the courts.

We are resuming a discussion broken off more than sixty years ago. In the dramatic period that centers around the year 1848, new ideas were abroad in the world; many of our states re-

modeled their constitutions; and six of them, including New York in the east and California in the west, inserted provisions saying: "The legislature may establish tribunals of conciliation." Not a single tribunal was established, the whole idea was submerged in the swift current of affairs culminating in the Civil War. It was forgotten, but today after two generations, the subject again presses for attention by the American Bar.

The nature of conciliation makes a precise definition difficult. Conciliation is not an institution (like a court); it is a *method*. A method of procedure, if you wish, but conciliation proceedings are so informal, so flexible, and so variable that our ancient friend, Mr. Chitty, who wrote an early treatise on pleading and knew exactly when to demur to an anticipatory replication in a declaration, would indignantly say that conciliation had no procedure worthy of the name at all. Although we cannot define the method of conciliation in detail because there are no fixed details, we can state its general form and outline. . . .

Conciliation is an informal proceeding by which two disputants are enabled to discuss the issue between them in private before a trained and impartial third person having the dignity of official position, representing the state, who explains to them the rules of law applicable, informs them of the uncertainty and expense of litigation, tries to arouse their friendly feelings and suppress their fighting instincts. If an adjustment agreeable to the parties is reached, the official draws up a proper agreement, has it signed, and certifies it so that it may be entered in court as a judgment. There are no pleadings. There are no rules of evidence. The parties tell their stories in their own words. There are no lawyers—plaintiff and defendant appear in person.

## 2. RELATION OF CONCILIATION TO THE ADMINISTRATION OF JUSTICE

What is the relation of this conciliation proceeding to the administration of justice; where does it fit into our established legal institutions? Conciliation, being flexible, adapts itself to our present system in different ways, and appears in various guises, but a sound analysis reveals, I think, two distinct types of relationship:

(1) Conciliation may be carried on by tribunals acting entirely independently of the courts. Here conciliation is an auxiliary to the system of courts. The connecting link is the provision of law that no case can be tried in the courts until first an attempt at conciliation has been made.

(2) Conciliation may be employed by the courts themselves. In this case, conciliation becomes a new piece of equipment for securing justice, entrusted to the judges in addition to their duties under our traditional system of litigation.

If we can keep these two types distinctly in mind, it will clarify the later discussion; but it is far more important to note that in both cases conciliation serves and aids the administration of justice. There is much confusion and misunderstanding on this point. There is an idea that the plan of conciliation is hostile to and irreconcilable with our common law system of securing justice. It is not difficult to see what causes this mistaken conclusion.

Conciliation is the way of peace, while litigation, which grows out of the ordeal by battle, still represents the idea of conflict. The salient features of conciliation are the antithesis of the characteristic features of the common law trial system: privacy as against public hearings, no procedure as against an elaborate procedure, no rules of evidence as against multitudinous rules of evidence, no jury as against the guarantee of a jury of one's peers, the absence of attorneys as against the necessity for the presence of attorneys.

If we had to choose between the two, of course, we should select the common law system which alone has the power needed for certain types of cases and persons. But because the two types are opposite it does not follow that they are alternatives, one excluding the other. In truth, they are complementary, each aiding the other.

The conciliation proceeding is used before *and only before* resort is had to litigation in the courts. Insofar as it fails, the regular work of the courts in conducting litigation remains unchanged and unimpaired. Insofar as conciliation succeeds, litigation is avoided and the burden of the courts is lessened.

We can fix the place of conciliation in the general scheme of things, and incidentally throw further light on the nature of a conciliation proceeding, by contrasting it with a small claims court and an arbitration proceeding.

A small claims court uses very informal procedure, but it is a court of law. Its decision is based on the rules of substantive law. The defendant appears in answer to a compulsory summons. It has legal jurisdiction. Its judgment is as binding as that of any court in the land.

An arbitration proceeding is not a court proceeding. The arbitrator has jurisdiction only when the parties *voluntarily*

sign a submission to arbitration. From that point on arbitration is compulsory in the sense that the award can be filed in court and is binding on both parties whether they like it or not.

A conciliation proceeding in its pure form is a voluntary proceeding from first to last. The tribunal has no compulsory jurisdiction over the defendant. The plaintiff cannot sue in the law courts without first coming before the conciliation tribunal, but it has no other power over him. It may or may not follow the substantive law. The conciliator may suggest any honorable adjustment or solution. He cannot render a decision or enter a judgment unless both parties agree to it.

The entirely voluntary character of conciliation is at once the source of its moral power and the limitation on its legal power. What if the defendant refuses to appear? Then conciliation fails. Or, if the plaintiff comes with this attitude: "I am here because I have to go through this form but my heart and mind are closed; I'll have the law on this defendant yet?" Then again conciliation fails. Finally, if the conciliator after hearing the facts is convinced that the defendant has cheated the plaintiff, but finds that the defendant is obdurate, what can he do? Nothing. He cannot make a finding. He cannot advise the court. His lips are sealed, the conciliation tribunal is like a confessional.

After this catechism one may think that conciliation is an Utopian dream. As practical men, concerned with the actual improvement of the administration of justice, we are not interested in a metaphysical discussion as to the inherent uprightness of human beings. As proof that conciliation can succeed we want evidence that it has succeeded.

### 3. THE PRESENT EXTENT OF CONCILIATION.

Let us take a bird's-eye view and see how far conciliation has already been utilized.

Conciliation tribunals have existed in Norway and Denmark for more than a century. A law providing conciliation tribunals was enacted in North Dakota in 1921, and in Iowa in 1923. These are instances of pure conciliation, administered not by the courts, but by independent tribunals or officers, so that conciliation is an auxiliary to the regular court system.

Conciliation administered by courts is to be found in the small claims courts in Cleveland, Milwaukee, and Minneapolis. The procedure of a small claims court is so informal that it is easily converted into conciliation procedure. The two merge and be-

come indistinguishable. The small claims court in Cleveland, for example, has always been called the "Conciliation Court."

Conciliation is employed by industrial accident commissions. Where cases are not automatically settled and formal hearings appear necessary, several commissions first try an intermediate informal hearing. This plan has been successful; many cases are successfully disposed of. These are not labelled "Conciliation hearings," but that is nevertheless what they are.

Domestic relations courts are more and more invoking this method. Conciliation becomes reconciliation. When it succeeds it is far more efficacious than any other remedy known to the law.

In 1917 the Justices of the New York Municipal Court, acting under power vested in them by law, issued a series of rules providing for conciliation.

In America, conciliation has been employed only in connection with limited types of cases. We have noted domestic relations and industrial accidents. In North Dakota it applies only to claims of \$200 or less; in Iowa to claims under \$100; in Cleveland to matters involving \$35 or less. The Minneapolis Conciliation Court has jurisdiction up to \$100. In cases under \$50 it has power to enter judgment; as to cases over \$50 it has no compulsory power and this pure conciliation proceeding is little used.

In the Scandinavian countries, on the other hand, conciliation plays its part in practically all types of civil cases.

While experiments with conciliation are naturally made on the little cases first, there is no logical reason why conciliation should be limited by jurisdiction or by amount of money involved. Conciliation is a *method*, and as such is applicable to other types of cases as well.

#### 4. WHAT BENEFITS MAY BE DERIVED FROM CONCILIATION

When the New York Municipal Court Justices issued their rules they said: "The conciliation system marks a new epoch in the administration of justice in this state."

Insofar as conciliation proves successful certain direct and substantial benefits will flow from it. Because of its very nature a conciliation proceeding is inexpensive and is not subject to delays. Cheapness and speed are a blessing to all litigants, and a Godsend to the poor.

Conciliation prevents litigation by rendering it unnecessary, and this means less congested dockets, less pressure on over-



driven judges, and ultimately a lightening of the taxpayer's burden.

Modern conditions of life engender a great deal of friction that in turn produces a mass of litigation. Disputes run all too easily into class, religious, and racial animosities and prejudices. Litigation tends to inflame and perpetuate quarrels. When the state provides conciliation tribunals it teaches the lesson of moderation, forbearance, mutual adjustment and honorable compromise. When conciliation becomes firmly established in the traditions of a people, it exerts a powerful influence for their greater happiness, prosperity, and safety.

### c. Arbitration

[Smith, *Justice and the Poor* (Charles Scribner's Sons), pp. 68-72.]

Arbitration, as a method of settling disputes, is more generally and better known than conciliation. It stands midway between conciliation and court litigation. Like the former, it is a method that can be used only by consent, and so differs from judicial procedure which rests on compulsion. But once the agreement is made, and the arbitration tribunal has entered its award, the enforceability of the decision rests not on consent as in conciliation, but on the compulsion of legal process by judgment and execution. . . .

Arbitration as provided for by statute in effect permits disputants to create a tribunal of their own either by agreeing on the persons to arbitrate or by agreeing to use the arbitration machinery of some private organization, as a chamber of commerce. This agreement is generally called a "submission," and if it contains a provision to that effect, the law permits the award to be entered as a court judgment and enforced in like manner. The great defect in the American statutes is that either party may, after the submission and any time before the final award, revoke his agreement and thereby annul all the proceedings.

The arbitration proceeding is obviously one not conducted according to the legal rules of procedure and evidence. So long as the arbitrators give the disputants a fair chance to present their full case, they can conduct the hearings as they like, and accept such evidence as seems to them helpful. More important, statutory arbitration need not at all be a determination of right and wrong according to rules of substantive law. An award may be revoked for fraud, corruption, or serious and prejudicial

misconduct, just as the decisions of a court may be set aside on like grounds, but there is no authority for revoking a finding because it fails to accord with rules of law. . . .

Arbitration has been coming more and more generally into use through the insistence of merchants acting through their trade groups or chambers of commerce. Under the energetic guidance of Charles L. Bernheimer a splendid organization has, since 1911, been built up under authority of the Chamber of Commerce of the State of New York, which has been followed elsewhere, notably by the Chicago Association of Credit Men. This revival has been forced by three considerations,—first, a desire for a decision by an expert having personal knowledge of trade conditions and customs, a thing which the courts have never been able to afford; second, a hope of supplanting the enmity provoking litigious method with an amicable procedure which would not interrupt business relationships; and thirdly and chiefly, a determination to escape from the intolerable delays of the regular administration of justice. . . .

Commercial arbitration has not solved expense because it has not tried to. Costs and fees have not been prohibitive to business men. It has, however, served to eliminate delay, it has greatly reinforced the idea of conciliation, of which the New York Chamber of Commerce Arbitration Committee says, "Perhaps the most important work of your Committee has been in the way of conciliation," and it has, through its informal procedure, occasionally been of direct assistance to poor persons. For us, its great significance is that it has revived the idea, and delivered a body blow to that legal Cerberus of pleading, procedure, and evidence by proving that justice can be as faithfully, more satisfactorily to the parties, and more quickly administered, even as to claims as large as one hundred and fifty thousand dollars, through an informal tribunal which has found no necessity for technical pleadings, or for a predetermined detailed procedure, or for excluding the kind of logical evidence which all the world, except the courts, uses in making its decisions. . . .

A judicial arbitration of a small claim is exactly the same as a proceeding in a small claims court, for the keynote of both is an informal procedure which makes for despatch, saves expense, and generally renders the attorney unnecessary. And in both the judgment rendered is in accordance with substantive law. Arbitration, however, is not limited to small claims, but extends to all claims, irrespective of amount. . . .

In their effect on the problem of denial of justice and in the

solution that they afford, small claims courts, conciliation, and arbitration have much in common. In all three, court costs cease to prohibit, for they have been minimized or abolished. The proceedings, in their very nature, make despatch easy and delay difficult. In parallel ways they avoid the fundamental difficulty of the expense of counsel by making the employment of attorneys unnecessary. In all conciliation, in the large proportion of small claims, and generally in matter submitted to arbitration, after rules of pleadings, procedure, and evidence have been eliminated, there is nothing left for the lawyer to do. . . .

## 156. THE GRAND JURY

The grand jury is a long-established institution in the administration of criminal justice, but it is coming to be regarded in many quarters as a cumbrous and unnecessary adjunct. In a number of states it has been reduced to a position where it is used only occasionally in unusual cases, while for ordinary use the filing of an information by the prosecuting attorney is substituted.

[*Illinois Constitutional Convention Bulletins, 1920, pp. 832-835.*]

**Criticisms of the grand jury.** In cases where the accused is arrested on a complaint, and examined by a justice of the peace or a judge, if it is found that an offense cognizable in the circuit court has been committed, and that there is probable reason for believing the accused guilty, the accused is bound over to await the action of the grand jury. The grand jury must find an indictment against the accused before he can be brought to trial. In this procedure it is necessary for the state's witnesses to appear before the examining magistrate, the grand jury and the trial court. It is urged that this is too great a hardship upon the witnesses.

It is also contended that in such cases the action of the grand jury is superfluous, because it acts merely as a ratifying body for the examining magistrate or the state's attorney.

One recent author defends the grand jury as follows: "There are many cases of a trifling nature which are returned by the committing magistrates and when brought before the grand jury the indictments are ignored. In counties where the volume of business is small, it would be of little consequence if the grand jury found true bills even in these cases, but in counties where the volume of business is large . . . it then becomes of vital importance that there should be a tribunal to sift from the great mass of cases those which are too trifling in their nature to receive

further prosecution; and this is a duty which could not well devolve upon one single officer, for unless testimony was heard by him, there would be no feasible way to determine which cases should be prosecuted and which ignored. If evidence is therefore to be heard, it is wiser that it be heard and considered by a body impartially selected from the people than by a single officer whose training would incline him to find grounds upon which the prosecution might be sustained."

Some objection is made to grand jury proceedings because the accused has no opportunity to explain away the evidence. The proceedings are *ex parte*, the grand jury hearing only the evidence for the state. Where the accused is arrested and brought before a judge or a justice of the peace for a preliminary examination evidence both for and against the accused is heard.

It is also contended that the examination by the grand jury is not an economical proceeding. In Cook County, 276 grand jurors served during each of the years of 1916 and 1917, and only 600 persons were drawn for grand jury service during each of these years. The fees of grand jurors is three dollars per day.

The grand jury system has been criticised on account of its secret deliberations. It is urged that secrecy tends to permit unfounded and malicious accusations to be made by parties who would not dare to act openly; and that, regardless of the ultimate outcome of the prosecution of an indictment founded upon an ungrounded charge, the reputation of the accused must suffer. In answer to this, it is pointed out that the statute requires that the names of all witnesses shall be endorsed upon the indictment, and also, that the secret deliberations permit people more readily to bring and have investigated complaints against the more powerful criminals.

In answer to the argument that the grand jury is a useless institution, and that its work could be performed by allowing the state's attorney to file an information, it is urged that in cases where the accused is powerful and has influence, or is a friend of the state's attorney, this official may hesitate to act; that in such instance a body of representative men of the county may be found to be better fitted to act, and evidence may be submitted to the grand jury, which the state's attorney would hesitate to submit to a magistrate, where he had to assume the responsibility for instituting the proceedings.

Assuming the continuance of the grand jury, it is contended that there is no necessity for a grand jury consisting of twenty-three jurors, as a smaller number would be sufficient.

**The grand jury in other states.** Georgia, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, Vermont, Virginia and Wisconsin have no constitutional provisions requiring indictments by a grand jury. The statutes of these states, however, require or permit grand juries. The constitutions of all other states contain provisions requiring or permitting indictments by a grand jury in criminal cases, or in certain classes of criminal cases. In some of these states, indictment by a grand jury is optional, other methods being provided to replace the indictment. A few states require indictment by a grand jury only in capital cases or in cases where the punishment is by imprisonment for life. In several states the grand jury may be abolished, and in some states the number constituting a grand jury has been fixed at less than the common law number.

In twenty-five states the constitutions require indictments for certain crimes. Nearly all of these states require indictments only for felonies, but the constitutions of Arkansas, Nebraska, New Jersey, South Carolina, Tennessee, and West Virginia require indictments for all or some misdemeanors, as well as for felonies. Connecticut requires an indictment only for those crimes in which the punishment may be by death or imprisonment for life. The Louisiana constitution requires an indictment in capital cases, but in other cases the accused may be held to trial on information.

The constitutions of Colorado, Nebraska, North Dakota and Wyoming provide that the legislature may change, regulate or abolish the grand jury. The constitution of Nebraska permits the legislature to provide for holding persons to answer for criminal offenses on information of a public prosecutor. The Iowa constitution permits the legislature to provide for holding persons to answer for any criminal offense without the intervention of the grand jury. The constitution of Indiana contains a provision that the legislature may abolish or modify the grand jury system. The constitutions of Alabama, Arkansas, Mississippi and Delaware permit the legislatures to dispense with the grand jury in misdemeanors and to authorize such prosecutions before justices of the peace or in inferior courts.

The constitutions of Arizona, California, Missouri, Montana, Nevada, Oklahoma, South Dakota, Utah, and Washington provide that cases may be prosecuted by information as well as by indictment. An examination and commitment by a magistrate is a preliminary requirement to the filing of an information in

Arizona, California, Idaho, Montana, Oklahoma and Utah. The constitution of Louisiana which requires an indictment in capital cases, permits information in all other cases. . . .

**Retention of grand jury for occasional use.** In several of the states in which information and indictment are concurrent remedies, a grand jury can be called only upon an order of the judge of a court having power to try and determine felonies. A provision to this effect is found in the constitutions of Missouri, Oklahoma, Arizona, Montana, Idaho and Utah. The Utah constitution provides "no grand jury shall be drawn or summoned unless in the opinion of the judge of the district, public interest demands it." The Arizona constitution provides: "Grand juries shall be drawn and summoned only by order of the superior court." The constitutional provision relating to convening of grand juries in Missouri, Montana and Idaho are similar to those in Utah and Arizona. The constitution of Oklahoma provides that the grand jury shall be convened by the judge upon his motion, or shall be ordered by the judge upon the filing of a petition signed by 100 resident tax payers of the county. Michigan, Kansas, Washington, California and South Dakota have constitutional or statutory provisions which permit an infrequent use of the grand jury.

## CHAPTER XXV

### STATE FINANCE

#### 157. THE CUSTODY OF STATE FUNDS

Since the amount of money collected and disbursed by the states has greatly increased during recent years, it follows that the safe-keeping of the public funds has become a problem of increasing importance. It is, moreover, not only highly desirable that the funds should be safely kept but also that the state should receive a reasonable rate of interest upon them. The following selection gives some indication of present conditions together with suggestions for improvement.

[Faust, *The Custody of State Funds* (National Institute of Public Administration), pp. 62-65, 71-72.] *Chas.*

The official machinery vested with the responsibility of designating the public depositories in the majority of states consists of a depository board. Twelve of the states vest this authority exclusively in the state treasurer. The most important work of the depository board is to designate the depositories, to fix the rate of interest on the public deposits, and to approve the security pledged to guarantee safe-keeping of the funds and compliance with the conditions imposed. These boards rarely exercise any general supervisory powers over the funds in the hands of the bank depositories. In the distribution of the funds among the designated depositories, the discretion of the treasurer is still the important factor. He is also a member of the depository board. The interposition of the depository board has meant releasing the treasurer from liability for the funds in the hands of the depositories. An efficiently managed state depository system requires the close co-operation of the treasurer, auditor, director of finance, and banking commissioner.

We are accustomed to regard treasurers as ministerial officers whose main duties are to receive and to disburse the public funds as provided by law. A treasurer exercises, however, broad discretionary powers in handling the funds in the interval between their receipt and their disbursement. The emergence of the large treasury balances has added very considerably to the significance of this part of the treasurer's duties. Theoretically it seems desirable that one charged with the administration of

a large treasury balance should not be hedged in by all sorts of restrictions, which will inevitably handicap him, if he is to take advantage of every opportunity to handle the funds in such a way that they will be of maximum service to the state. It is readily conceivable that the most effective handling of cash might occur where statutory regulations were entirely absent. After all the main problem lies in the honesty and the competency of the official custodians. It has long been a commonplace that only by developing higher standards in the public service can we expect to achieve the best results in the performance of the public functions. But we cannot expect to improve the standards of official ethics, unless we first elevate the present low standard of public ethics. The persistence of conditions described in Pennsylvania and Illinois can only be ascribed to a tolerant and complacent public opinion. In no public office are the effects of a sluggish public conscience more clearly recognizable than in the office of state treasurer. Traditionally, insidious influences and subtle temptations have invested the office. Politically the state treasurership has been a prize much sought after, mainly because it presents the incumbent with unlimited opportunities to build up a strong personal following among men of wealth and influence. Men succeeding to the office with the most honest intentions have again and again succumbed to the innumerable temptations for personal advantage which have been its inherent attributes. The tendency of legislation has been, therefore, to attempt an elimination of the evils by restricting more and more the discretion of the treasurer in handling the funds entrusted to his custody. But the most important safeguard against treasury mismanagement and corruption is continuous criticism and checking of a treasurer's administration by an independent controller. Treasury records should be subject to automatic daily audit.

Under the old independent treasury system the safety of the state cash alone received consideration. The expanding volume of treasury transactions has made the custody of state funds a twofold problem of security and economy. Under the bank depository method of handling the public cash, it is still recognized that the factor of security must always have prior consideration. Obviously it would be false economy for a state to imperil the integrity of the funds, primarily to secure a large income for the use thereof. At the same time it should be recognized that the strict application of principles of economical administration of receipts and expenditures might conceivably reduce to relative



unimportance the entire problem of the safekeeping of the treasury funds. By effecting a close correlation between receipts and expenditures, the necessity of carrying large cash balances would be entirely eliminated. The states have made little progress in this direction. This stage in state fiscal administration will not be reached until we have perfected more scientific methods in this field, and have been able to overcome the public inertia and the official unwillingness traditionally resisting their application.

In distributing the funds among the designated depositories the two important factors considered are the financial strength of the depository and the amount of security it is willing to pledge to guarantee safekeeping of the funds. It is observed that approximately only one-half the states make any reference to this basis, that is that the capital stock and surplus of the depository shall be a limitation on the amount of state funds it may receive. It is argued that since depositories must pledge security to protect the funds, reference to the capital stock and surplus of the depository is no longer of much consequence. There are, however, obvious dangers lurking in such a situation. A comparatively insignificant bank can be made the instrument whereby a small group with the proper political connections may use the public funds to enhance their private fortunes, while operating ostensibly within legal bounds. Reference to the capital stock and surplus of the depositories, in the distribution of the funds, were required by law, reduces the possibilities of this form of treasury manipulation. But if these limitations are too rigid, they may cause unnecessary inconvenience and embarrassment to the treasurer, especially during times when the treasury funds have temporarily or unexpectedly expanded.

. . . . .  
One of the most vital elements in the whole problem of the custody of state funds is the element of publicity. In almost all the states at the present time a veil of secrecy surrounds the administration of the public deposits. Many of the evils that have sprung up in the several states in connection with the handling of the state funds might be eliminated if adequate publicity were given to the relations between the depository banks and the official custodian. Banks should be required to include in their published statements the amount of their state deposit. Only three states have such a requirement. The state treasurer, furthermore, should be required to issue periodically and publish in the newspapers statements showing the amount of funds on

deposit in each of the several state depositories. At least once a year the treasurer should be required to publish a report showing interest receipts by banks, the rate of interest each bank pays, and the average balance of state funds carried in each bank during the year.

Finally, to sum up the situation with respect to the custody of state funds, it is important to recognize first of all that the growing expansion of government business with the consequent large treasury balances demands the elimination of corruption and misfeasance in the handling of state funds, the abandonment of wasteful and inefficient methods, and the administration of the public funds with the same scrupulous care that the private funds of efficient business corporations are managed. The specific suggestions made by the writer toward the attainment of this end are: the distribution of state funds on the basis of the capital and surplus of the banks; the pledging of collateral securities or surety company bonds by the banks to protect the deposits; the centralization of treasury control to increase the available supply of cash and to prevent the dissipation of funds among many departments and offices; the stabilization of treasury accounts by arranging for active and inactive depositories and time deposits; the introduction of competitive bidding to secure the highest rates consistent with safety for the funds; the elimination of practices that impair the credit of the state, such as failing to pay obligations promptly or issuing interest bearing warrants; the reduction of interest charges by substituting revenue notes for tax anticipation warrants, by not issuing bonds until the time the funds are actually needed, by eliminating the special funds rendering the treasury immobile, and by aiming to secure closer co-operation between the state and the depository banks; the reduction of cash balances by correlating receipts and disbursements and by making temporary investments of surplus funds. But regardless of statutory safeguards and mandatory provisions, the first consideration must always be the character of the responsibilities of the treasury office.

## 158. THE TREND OF STATE EXPENDITURES

The increasing cost of running the state governments is well known. The following article not only indicates the extent to which the increase has gone, but also points out the particular objects of expenditure in which the greatest increases have occurred.

[A. F. Macdonald, in article reprinted from *The Annals of the American Academy of Political and Social Science*, Philadelphia, Pa., May, 1924, vol. CXIII, no. 202, pp. 8-15.]

In the year 1913 the forty-eight states of the Union spent about 382 million dollars for governmental purposes. In 1922 they spent somewhat in excess of one billion, 280 million dollars. The cost of operating our state governments increased, therefore, 235 per cent in the nine-year period from 1913 to 1922. Made without explanation or reservation, this is a rather startling statement. But there are two factors which obviously must be taken into consideration in making any comparison of governmental expenditures during the last decade. One is an increase of 35 per cent in the population of the United States; the other is an increase of 49 per cent in the general level of prices.

Reduced to a per capita basis, the increase in the governmental expenditures of the states from 1913 to 1922 was 199 per cent. Costs rose gradually until 1919; after that year they mounted rapidly. The following table indicates per capita costs for the period:

1913	.....	\$3.95
1915	.....	5.03
1917	.....	5.08
1919	.....	6.09
1921	.....	9.46
1922	.....	11.82

The figures are not fairly comparable, however, until allowance is made for fluctuations in the price level during the last decade. The United States Bureau of Labor compiles monthly an index number based on the wholesale prices of 404 commodities; and the per capita expenditures of the states, when weighted in accordance with this index number, indicate with reasonable accuracy the real increase in the cost of running our state governments. The table below gives per capita governmental-cost payments of the states in terms of 1913 dollars:

1913	.....	\$3.95
1915	.....	4.98
1917	.....	2.87
1919	.....	2.95
1921	.....	6.43
1922	.....	7.93

When reduced to a per capita basis and measured in terms of 1913 dollars, therefore, state expenditures for governmental purposes exactly doubled in the period from 1913 to 1922. One hundred per cent represents the true rate of increase. In 1917 and 1919, as shown by the table, the states spent relatively less

than in the year immediately preceding the outbreak of the World War. This decrease was due to the large part played by salaries in state costs. Salaries and wages always lag behind commodity costs in a period of rising prices, and their action during the last few years proved no exception to the general rule. Until 1920 the states were paying salaries based in large measure on the pre-war price scale. By 1921, however, this discrepancy had been adjusted, and did not need to be considered in comparing state expenditures.

An actual increase of 100 per cent in the per capita cost of running our state governments within the short space of nine years calls for more than a passing comment. It represents a real burden on the taxpayers of the nation. During the same period municipal expenditures increased less than twenty per cent, due allowance being made for growing population and rising prices. A comparison with the costs of the Federal Government cannot fairly be made, because of the effect of the war on national finance.

Whether the taxpayers are receiving an equivalent for the rapidly mounting costs of their respective state governments in the form of more and better services is a pertinent question. In recent years the states have been called upon to perform many functions formerly left to private initiative. Education and charity, for example, have been transferred in large part from private to governmental agencies. New duties entail new expense, even if carried out in niggardly fashion. And the work of the states has been performed in anything but a parsimonious manner. The people have consistently laid more stress on raising the standard of service than on reducing the expenses of government. Better training for teachers is demanded instead of lower salaries. Concrete highways at a construction cost of \$35,000 a mile are preferred to cheap dirt roads.

The demand of the American people for new services and for higher standards undoubtedly accounts in part for the rapidly increasing cost of operating our state governments. Whether it offers an adequate explanation can be determined only by examining in detail the various items of state expenditure, and ascertaining the purposes for which state money is being spent. [Then follows such a detailed examination.]. . .

Armed with this long and rather tedious array of statistics, we are in a position to draw some conclusions as to the recent trend of state expenditures. Governmental costs, we find, are rising steadily, but these increases are due almost entirely to the

expansion of governmental activity and to the improvement of governmental service. Eliminating price fluctuations, there has been no material increase in the last decade in the per capita cost of operating our state executive, legislative and judicial departments. The same is true of protection to person and property, while public recreation has suffered a decrease. Education, charities, hospitals and corrections have all been affected by the public demand for higher standards. Better equipped schools and better trained teachers are everywhere regarded as a necessity. The care of the physically, mentally and economically unfit is coming to be regarded as a science. These changing concepts mean larger appropriations to maintain the higher standards, but the increases have not been large. The cost of public health and sanitation work has risen more rapidly in the last decade. Special attention paid to the prevention and treatment of communicable diseases has resulted in an increase of 85 per cent.

But the most startling development of the last decade in the field of state finance has been the rapid growth of one or two functions which were so insignificant at the beginning of the present century that they were almost lost in the long list of state expenditures. Chief of these is highways. A rise of 364 per cent in disbursements for highway maintenance between 1913 and 1922, and an increase which must have been nearly 1,000 per cent in payments for road construction, go far toward explaining the increased cost of operating our state governments. This is particularly true when we remember that differences due to a growing population and to an increase in the general level of prices have been eliminated. The rate of increase would otherwise be nearly twice as great. The development and conservation of our natural resources, an item not even recognized in the Census Bureau's classification of state expenditures in 1913, had reached the surprising sum of 38 cents per capita by 1922. The ultimate result of a policy of conservation is to save the natural wealth of the states, but its immediate effect is to require the outlay of more money.

It seems clear that there will be no considerable reduction, in the immediate future, at least, of state operating costs. The people are demanding more and better services from their state governments, and they are receiving what they ask. *Vox populi, vox dei*. But when in the same breath they demand lower taxes, their collective voice loses some of its divine quality. Only foolish mortals would expect to pay less and receive more. The

people are getting better roads and more of them; they are getting more schools and better teachers—but they are paying the bills.

### 159. THE STATE BUDGET

An important reform in financial procedure which has been widely introduced into the states within recent years is the executive budget. The great increase in state expenditures has made economical management of state finances even more necessary than formerly. The executive budget is a move in this direction in that it places the initiative in the hands of the governor and thus concentrates responsibility for the estimates. Usually the legislature is legally free to change the governor's estimates as it sees fit, but in Maryland it is limited in this respect by the Constitution. The first of the following selections gives the text of the Maryland budget amendment, while the second contains the text of the constitutional amendment which was adopted by the voters of New York state in November, 1927. This amendment provides for a genuine executive budget and displaces the old board of estimate and control, composed of executive and legislative officers. Under the new plan, the governor formulates the budget on the basis of a revision of the estimates submitted by the various departments. The legislature is to be permitted to add distinct new items of appropriation, which will, however, be subject to the governor's veto. The amendment greatly strengthens the governor's financial control.

#### a. The Maryland Budget Amendment

[Constitution of Maryland, Art. III, sec. 52, in *Kettleborough, State Constitutions*, pp. 626-628.]

SEC. 52. The general assembly shall not appropriate any money out of the Treasury except in accordance with the following provisions:

Sub-Section A: Every appropriation bill shall be either a Budget Bill, or a Supplementary Appropriation Bill, as hereinafter mentioned.

Sub-Section B: First: Within twenty days after the convening of the General Assembly (except in the case of a newly elected Governor, and then within thirty days after his inauguration), unless such time shall be extended by the general assembly for the session at which the budget is to be submitted, the governor shall submit to the general assembly two budgets, one for each of the ensuing fiscal years. Each budget shall contain a complete plan of proposed expenditures and estimated revenues for the particular fiscal year to which it relates; and shall show the estimated surplus or deficit of revenues at the end of such year. Accompanying each budget shall be a statement showing: (1) the revenues and expenditures for each of the two fiscal years

next preceding; (2) the current assets, liabilities, reserves and surplus or deficit of the State; (3) the debts and funds of the State; (4) an estimate of the State's financial condition as of the beginning and end of each of the fiscal years covered by the two budgets above provided; (5) any explanation the governor may desire to make as to the important features of any budget and any suggestion as to methods for the reduction or increase of the State's revenue.

Second. Each budget shall be divided into two parts, and the first part shall be designated "Governmental Appropriations" and shall embrace an itemized estimate of the appropriations: (1) for the general assembly as certified to the governor in the manner hereinafter provided; (2) for the executive department; (3) for the judiciary department, as provided by law, certified to the governor by the comptroller; (4) to pay and discharge the principal and interest of the debt of the State of Maryland in conformity with Section 34 of Article III of the Constitution, and all laws enacted in pursuance thereof; (5) for the salaries payable by the State under the Constitution and laws of the State; (6) for the establishment and maintenance throughout the State of a thorough and efficient system of public schools in conformity with Article VIII of the Constitution and with the laws of the State; (7) for such other purposes as are set forth in the Constitution of the State.

Third. The second part shall be designated "General Appropriations," and shall include all other estimates of appropriations.

The Governor shall deliver to the presiding officer of each House the budgets and a bill for all the proposed appropriations of the budgets clearly itemized and classified; and the presiding officer of each house shall promptly cause said bill to be introduced therein, and such bill shall be known as the "Budget Bill." The Governor may, before final actions thereon by the General Assembly, amend or supplement either of said budgets to correct an oversight or in case of an emergency, with the consent of the general assembly by delivering such an amendment or supplement to the presiding officers of both houses; and such amendment or supplement shall thereby become a part of said budget bill as an addition to the items of said bill or as a modification of or a substitute for any item of said bill such amendment or supplement may affect.

The general assembly shall not amend the budget bill so as to affect either the obligations of the state under Section 34 of Ar-

ticle III of the Constitution, or the provisions made by the laws of the State for the establishment and maintenance of a system of public schools, or the payment of any salaries required to be paid by the State of Maryland by the Constitution thereof; and the general assembly may amend the bill by increasing or diminishing the items therein relating to the general assembly, and by increasing the items therein relating to the judiciary, but except as hereinbefore specified, may not alter the said bill except to strike out or reduce items therein, provided, however, that the salary or compensation of any public officer shall not be decreased during his term of office; and such bill when and as passed by both houses shall be a law immediately without further action by the governor.

Fourth. The governor and such representatives of the executive departments, boards, officers and commissions of the State expending or applying for State's money, as have been designated by the governor for this purpose, shall have the right, and when requested by either house of the legislature, it shall be their duty to appear and be heard with respect to any budget bill during the consideration thereof, and to answer inquiries relative thereto.

Sub-Section C: Supplementary Appropriation Bills: Neither House shall consider other appropriations until the Budget Bill has been finally acted upon by both Houses, and no such other appropriation shall be valid except in accordance with the provisions following: (1) Every such appropriation shall be embodied in a separate bill limited to some single work, object or purpose therein stated and called herein a Supplementary Appropriation Bill; (2) Each Supplementary Appropriation Bill shall provide the revenue necessary to pay the appropriation thereby made by a tax, direct or indirect, to be laid and collected as shall be directed in said Bill; (3) No Supplementary Appropriation Bill shall become a law unless it be passed in each house by a vote of a majority of the whole number of the members elected, and the yeas and nays recorded on its final passage; (4) Each Supplementary Appropriation Bill shall be presented to the governor of the state as provided in Section 17 of Article II of the Constitution and thereafter all the provisions of said Section shall apply.

Nothing in this amendment shall be construed as preventing the legislature from passing at any time in accordance with the provisions of Section 28 of Article III of the Constitution and subject to the Governor's power of approval as provided in Sec-



tion 17 of Article II of the Constitution an appropriation bill to provide for the payment of any obligation of the State of Maryland within the protection of Section 10 of Article I of the Constitution of the United States.

Sub-Section D: General Provisions: First. If the Budget Bill shall not have been finally acted upon by the legislature three days before the expiration of its regular session, the Governor may, and it shall be his duty to issue a proclamation extending the session for such further period as may, in his judgment, be necessary for the passage of such Bill; but no other matter than such Bill shall be considered during such extended session except a provision for the cost thereof.

Second. The Governor for the purpose of making up his budgets shall have the power, and it shall be his duty, to acquire from the proper State officials, including herein all executive departments, all executive and administrative offices, bureaus, boards, commissions, and agencies expending or supervising the expenditure of, and all institutions applying for State moneys and appropriations, such itemized estimates and other information, in such form and at such times as he shall direct. The estimates for the Legislative Department, certified by the presiding officer of each house, of the judiciary, as provided by law, certified by the Comptroller, and for the public schools, as provided by law, shall be transmitted to the Governor, in such form and at such times as he shall direct, and shall be included in the budget without revision.

The Governor may provide for public hearings on all estimates and may require the attendance at such hearings of representatives of all agencies, and of all institutions applying for State moneys. After such public hearings he may, in his discretion, revise all estimates except those for the legislative and judiciary departments, and for the public schools as provided by law.

Third. The Legislature may, from time to time, enact such laws, not inconsistent with this Section, as may be necessary and proper to carry out its provisions.

Fourth. In the event of any inconsistency between any of the provisions of this Section and any of the other provisions of the Constitution, the provisions of this Section shall prevail. But nothing herein shall in any manner affect the provisions of Section 34 of Article III of the Constitution of any laws heretofore or hereafter passed in pursuance thereof, or be construed as preventing the Governor from calling extraordinary sessions of the Legislature, as provided by Section 16 of Article II, or as pre-

venting the Legislature at such extraordinary sessions from considering any emergency appropriation or appropriations.

If any item of any appropriation bill passed under the provisions of this Section shall be held invalid upon any ground, such invalidity shall not affect the legality of the Bill or of any other item of such Bill or Bills.

### b. The New York Budget Amendment

[Adopted Nov., 1927.]

#### ARTICLE IV—A

§ 1. On or before the fifteenth day of October in the year nineteen hundred and twenty-eight and in each year thereafter the head of each department of the state government, except the legislature and judiciary, shall submit to the governor itemized estimates of appropriations to meet the financial needs of such department, including a statement in detail of all moneys for which any general or special appropriation is desired at the ensuing session of the legislature, classified according to relative importance and in such form and with such explanation as the governor may require. Copies of such estimates shall be simultaneously furnished to the designated representatives of the appropriate committees of the legislature for their information.

The governor, after hearings thereon, at which he may require the attendance of heads of departments and their subordinates, shall revise such estimates according to his judgment. The representatives aforesaid of the committees of the legislature shall be invited to attend such hearings, and under regulations to be provided by law shall be entitled to make inquiry in respect to the estimates and the revision thereof.

Itemized estimates of the financial needs of the legislature certified by the presiding officer of each house and of the judiciary certified by the comptroller shall be transmitted to the governor on or before said fifteenth day of October for inclusion in the budget without revision but with such recommendation as he may think proper.

§ 2. On or before the fifteenth day of January next succeeding (except in the case of a newly elected governor and then on or before the first day of February) he shall submit to the legislature a budget containing a complete plan of proposed expenditures and estimated revenues. It shall contain all the estimates so revised or certified and clearly itemized, and shall be accom-

panied by a bill or bills for all proposed appropriations and re-appropriations; it shall show the estimated revenues for the ensuing fiscal year and the estimated surplus or deficit of revenues at the end of the current fiscal year together with the measures of taxation, if any, which the governor may propose for the increase of the revenues. It shall be accompanied by a statement of current assets, liabilities, reserves and surplus or deficit of the state; statements of the debts and funds of the state; an estimate of its financial condition as of the beginning and end of the ensuing fiscal year; and a statement of revenues and expenditures for the two fiscal years next preceding said year in form suitable for comparison. The governor may before final action by the legislature thereon, and not more than thirty days after submission thereof, amend or supplement the budget; he may also with the consent of the legislature, submit such amendment or a supplemental bill at any time before the adjournment of the legislature.

A copy of the budget and of any amendments or additions thereto shall be forthwith transmitted by the governor to the comptroller.

§ 3. The governor and the heads of departments shall have the right, and it shall be the duty of the heads of departments when requested by either house of the legislature, to appear and be heard in respect to the budget during the consideration thereof, and to answer inquiries relevant thereto. The procedure for such appearance and inquiries shall be provided by law. The legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose; none of the restrictions of this provision, however, shall apply to appropriations for the legislature or judiciary. Such a bill when passed by both houses shall be a law immediately without further action by the governor, except that appropriations for the legislature and judiciary and separate items added to the governor's bills by the legislature shall be subject to his approval as provided in section nine of article four.

§ 4. Neither house shall consider further appropriations until the appropriation bills proposed by the governor shall have been finally acted on by both houses; nor shall such further appropriations be then made except by separate bills each for a single work or object, which bills shall be subject to the governor's approval

as provided in section nine of article four. Nothing herein contained shall be construed to prevent the governor from recommending that one or more of his proposed bills be passed in advance of the others to supply the immediate needs of government or to meet an emergency.

## 160. FINANCIAL METHODS IN ILLINOIS

Illinois was the first state to adopt any far-reaching scheme of administrative reorganization. This was accomplished by the passage of the so-called Civil Administrative Code of 1917, to which reference has previously been made. At the same time better budget methods were introduced, and other notable improvements in financial methods, which are well described by the first Director of Finance in that state.

### a. Functions of Department of Finance

[Omar H. Wright, in *Illinois Blue Book, 1919-20*, pp. 11-14.]

The Department of Finance is an entirely new function in Illinois State government. It took over no work performed by any board or commission. There were no precedents or set rules to follow. As created by the Civil Administrative Code the department discharges supervisory rather than operating functions. Its work brings it into intimate contact with the remaining eight departments and other departments and commissions rather than with the public.

### DUTIES OF THE DEPARTMENT

Its duties more specifically are:

- (1) To prescribe and install a uniform system of bookkeeping, accounting, and reporting;
- (2) To examine into the accuracy and legality of the accounts and expenditures of other departments;
- (3) To examine and approve, or disapprove, all bills, vouchers and claims against the other departments;
- (4) To prepare a budget for submission to the Governor; and
- (5) To formulate plans for better coordination of departments.

In addition to performing such specific duties the director acts as the financial adviser for the departments directly under the Governor's control, and as an observer for him.

The Civil Administrative Code recognizes that discretion is to be given the Director of Finance in prescribing financial and accounting details, making these uniform throughout all the departments.

Practically all of the powers of the department are vested in the director who by rules and regulations provides how such powers shall be administered.

It develops as a matter of common sense rather than law that the other departments consult the Department of Finance before undertaking any unusual matters having to do with these expenditures.

Weekly meetings of the directors have been held and have served to bring out questions of financial policy. In many cases where the Director of Finance has rules on a subject it has been necessary for him to make thorough investigations of the matter in question and all affairs relating to it. These investigations may have ranged from the quality of goods that were supplied in connection with a small bill, to the effects of a given policy of far reaching consequence.

The scope of the Department of Finance in its powers to conduct investigations is most thorough. Nearly everything done by any department finally comes as an expense to be passed upon by the Director of Finance. Thus it will be seen that systematic and thorough investigations are often necessary to put the Department of Finance in possession of facts essential to an equitable decision.

The assistant director was charged with the duties of prescribing and supervising the system of bookkeeping and accounting; the forms and accounts and financial reports and statements. In the discharge of these duties it was necessary to devise and install a system of reports from all departments under the code with the necessary blanks. A plan which was devised has proven successful. With possible modifications, reports can be made invaluable in determining the condition of each division in the code department.

#### MONTHLY REPORTS

Blanks were also prescribed for the monthly reports, which show not only the expenditures made at the end of each month from July 1, 1917, to the date on which the report was made, but also the bills which have not been paid, and the amount of the contracts which have been entered into or actual orders placed, and for which the goods and invoices have not been received. These reports state the amount of each appropriation which is available for any further expenditure.

The Military and Naval Department was not under the Civil Administrative Code, but by instruction from the Governor, this

department prescribed a system of accounting and financial control. Since January 1, 1918, reports have been made by the Adjutant General giving the condition of the financial affairs of his office at the close of each month.

Monthly reports of the same kind are being received from other boards and commissions whose vouchers are subject to the approval of the Governor.

On June 30, 1918, careful summaries were made and the different tables made up by this department from reports received, give the amount of money unexpended or saved by each division from its various appropriations covering the seven standard accounts called operating accounts. These are:

- Salaries and Wages;
- Office Expense;
- Traveling Expense;
- Operating Supplies and Expenses;
- Working Capital;
- School Supplies;
- Repairs.

Equipment, Buildings and Land were not included except where specifically shown.

Appropriations necessarily had to be and were made by the Fiftieth General Assembly on the then existing basis, and when some 30,000 wards of the State must be cared for, the cost cannot be considered, but the needs must be met.

Economy has been practised and savings made where they were never made before, but no extraordinary results can be cited because of more than extraordinary conditions.

The Civil Administrative Code has now been in operation through an entire biennium but the condition of the market for all supplies and materials which the State has had to purchase has been abnormal so that any comparison between the expenditure for the biennium closing June 30, 1917, and the purchases made since that date do not give any satisfactory results. Neither would a comparison between the expenditures of one year in the biennium ending June 30, 1917, and the expenditures of one year of the present biennium be satisfactory because of the tremendous increase in the cost of everything purchased by the State.

It has therefore seemed to us that the most tangible way to determine the real value of the code up to this time lies in the following facts:

The Governor, any State officers, any member of the Legislature or any private citizen can at this time apply to the Finance Department and be given the exact condition of the appropriations which were made to each division of the State Government which is under the operation of the code, as to the amount of money expended, the amount of money involved in the invoices which they have for supplies received and which have not been paid, the amount of money represented by contracts of all kinds which have been placed and for which supplies have not been received and the amount of money still unexpended.

This control of expenditures and the ability to know at all times the financial condition of each division is something which has not been attempted heretofore, and as far as we are informed, is not carried to the extent in any other state that it is in Illinois.

In order to make our plan of operation more successful, this department on February 15, 1919, began to pass upon requests made by divisions for anything and everything which they proposed to purchase, so that we not only know what they have done after the expenditure is made, but we know what they propose to expend before the materials are purchased.

As indicated above, it is always difficult to show by figures exactly what has been accomplished, especially if an attempt is made to compare with some other state for some certain period, or to compare figures in our own State for two different periods, because so many different things may enter into two sets of figures.

Therefore, we can but believe that the accomplishments cited above are really of more value to us, and to any commonwealth where they propose to attempt something of the kind than mere figures which might be furnished.

#### THE NEW BUDGET SYSTEM

It is with considerable satisfaction that this department refers to the work accomplished through the first State budget. So far as we know the adoption of our recommendations of appropriations for all State purposes by the General Assembly is the only instance of the kind in the United States. Some states have their budgets but in no case has the General Assembly accepted the recommendations for a budget so completely as was done by the Fifty-first General Assembly, just adjourned. Much time and care was spent in the preparation of a budget and every item contained in the \$62,000,000 appropriation bills was thoroughly

investigated. The appropriation committees of the Senate and the House of Representatives used due care and precaution in re-investigating the recommendations and much to our gratification, approved them almost in total. Few changes were made by the appropriation committees without consultation with this department. In other words, complete harmony existed between the appropriating bodies of the General Assembly and this department. Our recommendations for office expense, traveling expense, operating expense, and repairs and buildings were accepted almost entirely without change.

In addition to the budget being a great aid to the appropriation committees, it was possible for us to keep the Governor continually advised as to the gross amount of appropriations passed and pending from time to time, thus enabling him to approve or disapprove appropriation bills as they were passed with full knowledge of the probable total.

### b. Working of Budget System

[*Illinois First State Budget, 1919, pp. 5-10.*]

*His Excellency, Frank O. Lowden, Governor, Springfield, Illinois.*

SIR: The first State budget is transmitted herewith.

The budget has not been hastily prepared. In one form or another it has been under consideration since July 1, 1917, when the Department of Finance assumed its duties. The final figures, containing the recommendations of this department, represent the work, not of this department alone, but represent the judgment of the heads of other departments under the Civil Administrative Code who have heartily cooperated in its formation. After the estimates were collected, they were consolidated and reviewed. Recommendations for expenditures have been made on the principle of their relative importance to the general administrative policies to be executed during the next biennium. Following that principle, requests for funds were subjected to a critical analysis and careful comparison. Heads of departments were called into conference. Divergent views were harmonized. The general needs of the State were discussed and particular requests were weighed in view of the general requirements. As a result, the plan herewith submitted will meet the needs of the State for the next two years, unless the State through legislation to be adopted at the present session expands its functions and increases administrative duties. Of this subject more will be said



hereafter. Subject to the qualifications above adverted to, the Department of Finance attests the soundness and economy of the program set forth in the accompanying papers. . . .

The preparation by the executive of a budget for submission to the Legislature is a new departure in this State. It is made possible only by reason of the progress this State has made, during the last two years, in financial administration.

The financial progress of this State may be summarized as follows:

(1) The enactment of the Civil Administrative Code, unifying and consolidating over a hundred independent agencies, welding their detached operations into a logical and harmonious system, all of their financial operations being supervised through the Department of Finance;

(2) The installation of a uniform system of bookkeeping, accounting and reporting for departments under the Code;

(3) The establishment of ten standard appropriation accounts;

(4) The institution of the departmental budget;

(5) The requirement of monthly reports of disbursements and encumbrances for each department and division;

(6) The establishment of a central purchasing agency;

(7) The computation of unit costs;

(8) The fixing of executive responsibility for expenditures through the approval of vouchers by the Finance Department;

(9) Procuring, digesting and analyzing information concerning the financial needs of the State;

(10) A weekly meeting of heads of departments for the consideration of questions of policy involving all the administrative departments and thus creating an esprit d'corps among administrative leaders;

(11) The preparation of the first State budget.

By reason of these policies administrative functions have been discharged with energy and force and with a minimum expenditure of public funds. The theory underlying these principles is not only economy of administration, but of executive responsibility. This State has attained both ends.

The accomplishments of the last two years mark a distinct advance in financial administration. The program was a difficult one, but it has been worked out in its substantial features, at least. It is susceptible of further extension and development.

Prior to the enactment of the Code our laws contained few expedients to secure administrative responsibility. The Civil Administrative Code and policies instituted thereunder contain ex-

pedients by which executive responsibility is enforced and appropriations made by the General Assembly protected from abuse or misuse. By the creation of a central purchasing agency, a uniform method, plan or policy of purchasing supplies has been instituted. The State can take advantage of the economic laws of supply and demand. It can buy at wholesale rather than at retail. It has secured the usual trade discounts. As a protection to the State for the disbursement of the hundreds of thousands of dollars by the State purchasing agency, we have the provision of the law that contracts "shall be let to the lowest responsible bidder."

All accounts and expenditures of the several departments are examined by the Department of Finance. Summary and controlling accounts are kept in the office of this department. No bill or voucher can be passed for payment without the approval of the Department of Finance, which has the power either to approve or to disapprove of vouchers. A monthly report showing the amounts which have been allotted and expended for each purpose in detail, analyzed by objects of expenditure, is submitted to and kept on file in the Department of Finance.

It is thus shown that the responsible executive authority is at all times in possession of accurate reports showing the results obtained in operating and maintaining the various State activities. The expenditure of public funds and their accounting is an open book accessible at all times to the public. It has been said that "the greatest power to enforce responsibility would be through the possibility of making the acts of officers public."

Through the devices contained in the Civil Administrative Code, any committee of the General Assembly, or any private citizen, wishing to know what is being done, what organization is provided for doing the work, what moneys are being expended, how they are being expended, how it is proposed that they shall be expended in the future by any department under the Civil Administrative Code, has this information accessible through accounts kept in the office of the Department of Finance.

The devices above referred to have secured both economy and vigor of administration. This department, however, is persuaded that three other devices must be resorted to if the financial operations of the State are to be placed upon a sound and substantial basis. Reference is made to lump sum appropriations, the standardization of employments, and biennial appropriations.

Our Constitution contains a clear differentiation between the functions of the legislative department and the executive depart-

ment in the matter of appropriation and expenditure of the public funds. The Legislature "holds the purse strings." It determines all questions of policy which involve the expenditure of money. It should determine the character of expenditure and should approve a general plan of work, development or policy. Furthermore it must designate the administrative agency or organization through which money shall be expended or work executed. Stated in another way, the General Assembly is responsible for determining policies involving the expenditure of money.

When the General Assembly shall have assented to the general policy of administration, such policy is committed to the executive department for execution. The executive department is responsible for the economy and efficiency with which the plans and policies of the General Assembly are carried out.

Sound principles of administration, as well as good business policy, dictate that executive officials should be made responsible for contracts and purchases made in the execution of legislative policy. They should be given power under which the largest possible returns are secured for a given expenditure of money, time and energy.

The differentiation between the respective functions of the General Assembly and of the executive Department has not always been observed in this State—especially in more recent years. The criticism is not peculiar to this State alone, but applies almost without exception to the other states. The legislative branch has not only assumed to settle questions of policy, but also through itemized appropriations containing great minuteness of detail, has deprived the administrative branch of the exercise of discretion and consequently has weakened administration. Itemization of appropriations has been the rule and not the exception. Flagrant examples of detailed segregation are those found in the appropriations made in 1917 to the several State executive offices and to the several departments under the Civil Administrative Code, wherein can be found hundreds of individual items fixing in detail the exact salary which must be paid to the several employees. Also, the Appropriation Acts of 1917 are full of details as to the character and amount to be expended by an officer of a department for repairs to specific buildings or equipment. The appropriations made to the several Normal schools fixed not only the position, but the salary, by individual items, of each employee from president and dean down to the

gardener, janitor and yardman. Those made to the penal institutions were itemized to an extreme degree.

The argument against extreme itemization of appropriations may be summarized as follows:

- (1) It deprives an administrative officer of the exercise of business judgment and discretion as to the execution of policies;
- (2) It creates administrative irresponsibility;
- (3) It creates waste and extravagance;
- (4) It interferes with any efficient or effective system of employment and organization of State employees;
- (5) It prevents the exercise of the ordinary principles of business prudence.

One writer on government states "The rigidity of the segregation of items of appropriation may be compared to *rigor mortis* which holds the departments and institutions of the State in a death-like grip."

Appropriations should be made upon standard principle. After an experience of eighteen months in the practical administration of thousands of detailed segregated items of appropriation, together with a relatively small number of lump sum appropriations, this department is of the opinion that the principle under which appropriations should be made for salaries and wages is that of a lump sum. Such appropriations can be safeguarded against abuse and wastefulness by legislative enactment.

The fixing of salaries of the thousands of State employees by arbitrary appropriation acts, susceptible of no legal elasticity, cripples accomplishment. During the past two years wages increased approximately 40 per cent. The State was placed in competition with the Federal Government, with corporations and with commercial and industrial concerns. Under such rigidity of appropriations, many employees who remained in the State service were penalized. The service suffered accordingly. No business enterprise could conduct its affairs successfully or profitably where the salary of each employee is fixed irrevocably for a period of two and one-half years in advance. In many instances this department has been able to greatly improve former conditions, notably in the charitable institutions through the cooperation and assistance of the Department of Public Welfare.

In the adjustment of salaries as shown by the budget, this department recommends a considerable increase in the salaries paid the employees of the State institutions. This service has been crippled for months because of the impossibility of filling vacant positions. For a number of years penal and charitable authori-

ties have contended that the salaries appropriated did not attract those who were really qualified to have charge of the unfortunate wards of the State. Although the pressure for increased salaries in all of the State positions has been most extreme and insistent, increases recommended are in positions paying less than twelve hundred dollars per year, and in cases of some technical and educational positions where no increases have been granted for a number of years.

The department has found it necessary and important, often at the expense of valued and proficient employees, to gauge the salaries to be paid by the requirements of the position rather than by the capability of any individual employee. It is a truism that once the salary of a State position is fixed, it is never reduced and to adjust a salary for a person rather than for the position frequently would result in the State's being penalized later when, through the civil service, political or other change, the same position should be filled by a less proficient employee. This department deems it to be sound policy that the salary rates to be paid should be measured by the requirements of the position rather than by the abilities or attainments of the incumbent.

It is time to enter upon a constructive policy as to the standardization of State employments. Through civil service laws a policy, mostly negative and restrictive, has been worked out. No consistent policy, however, has been instituted to deal with the employment problem. There is no standardization. The condition found may be summarized as follows:

- (1) Fictitious, misleading and unnecessary titles are found;
- (2) No standard rates of pay for the same character of work prevail;
- (3) No systematic, just or equitable method of advancement and promotion is practiced;
- (4) Salaries, advancement and promotions are determined in a haphazard and irregular manner.

The civil service of the State should be placed on such a basis as to attract the ambitious. The State should be able to command the best brains and thought. Its service should be sought after by those who desire to advance and provision should be made by which the competent would be recognized and promoted. Such conditions do not prevail. However demonstrated the merit of an employee may be, under the present system he has little hope for preferment. Consequently he gets into a rut. This condition is bad for the individual, bad for the State, and bad for the service.

This department is of the opinion that a great advance would be made by standardizing employments and wages. In fact, standardization is essential if the best results are to be obtained from lump sum appropriations made for salaries and wages.

Some sound and substantial basis must be devised both to safeguard and protect the disbursements of enormous public funds as well as to insure a high degree of loyalty, efficiency, and fidelity in the public service.

This department recommends therefore that the General Assembly make some provision for an early standardization of public employment.

Previous General Assemblies have made a larger and larger percentage of its appropriations upon a per annum or a first year and second year basis. Arbitrary restrictions of this character have frequently made extremely difficult the economical use of funds. Conditions often prevail where for some excellent reason it may be unwise to expend appropriations within the first year, and yet contra it may be most advisable to be able to expend an additional amount during the second year. Where unusual market conditions prevail, a restriction of this nature results in a distinct loss.

Inasmuch as the Legislature only meets every two years, and must make appropriations for that period of time, we believe that good business judgment dictates that such appropriations should be made for the biennium rather than for the "first year" and the "second year."

While the Fiftieth General Assembly, in the main, continued the policy theretofore pursued of itemizing in detail many appropriations, yet it made a distinct advance in that, in appropriating to the several departments under the Civil Administrative Code, it made appropriations under such items as—

"Salaries and wages;"

"Departmental office expenses;"

"Traveling expenses;"

"Operating supplies and expenses;"

"Industrial working capital;"

"School supplies;"

"Repairs;"

"Equipment;"

"Building;" and

"Land."

Acting under the power to prescribe standard accounts, the Department of Finance established in its office ten standard ac-

counts, with appropriate sub-divisions under each account, in conformity with the above items of appropriations and kept its account of public expenditures by the several departments accordingly, even though, in many instances, the appropriation was an itemized one not falling within one of the above items. The experience of practical operation has demonstrated that with slight modification all of the appropriations for the ordinary and contingent expenses of the State Government are susceptible of being made in a limited number of items. The objects and purposes for which appropriations are made could be classified and standardized by items as follows:

- (1) Salaries and wages;
- (2) Office expenses;
- (3) Traveling expenses;
- (4) Operating supplies and expenses;
- (5) Industrial working capital;
- (6) Repairs and replacements;
- (7) Equipment;
- (8) Buildings, permanent improvements and betterments;
- (9) Land;
- (10) Fixed charges and contributions;
- (11) Contingencies;
- (12) Deficiencies and emergencies.

This department is of the opinion that after the General Assembly has considered the budget herewith submitted and has ascertained the amount necessary for expenditure by each officer, department or institution for each of the above purposes, it would conduce not only to energy and vigor of administration, but to economy of government, should the appropriations be made by items as above set forth.

Further than that, the number of appropriation acts is capable of great reduction from the number heretofore passed. In short, all of the appropriations for all officers, institutions and departments of the State Government, including the National Guard and Naval Reserve, are capable of being placed in a single act. In outlining the general form of the act, the General Assembly could proceed by organization units. Under each organization unit the appropriation can be made by objects, following the standard items above set forth.

The number of appropriation acts therefore could be reduced to the following:

- (1) General Appropriation Act;
- (2) Officers' Salary Act;

- (3) Deficiency Acts;
- (4) Private Relief Acts;
- (5) Special Appropriations.

Former appropriations have usually included large lump sums for contingent purposes and for various emergency needs. This method has made it necessary to include for each activity of the State a sum designed to cover possibilities unforeseen, and amounts the necessity for which are more or less problematical. It is obvious that appropriations made in this way have caused extravagance and unnecessary expenditure. The budget transmitted herewith includes a recommendation for an appropriation of two hundred fifty thousand dollars per annum to the Department of Finance, specific amounts thereof to be assigned to the various Code Departments and to the Adjutant General in the Appropriation Act. Any disbursement of funds therein appropriated to be made only upon a proper showing in writing as to existing demand or emergency, and subject to the approval of the Governor. Further authority should be given by which the Department of Finance could transfer funds from one department to the other as necessity demanded. It is evident that "peak loads" will not develop in all of the departments and divisions and such a plan therefore makes unnecessary large appropriations to each department for each such purpose.

The financial program as set forth in the budget presents a unified program and will meet the needs of the administration for the next two years, unless, as above stated, the State expands its functions or casts more work upon the departments. It is impossible to forecast what special appropriations may be made necessary by reason of the revision of our statutes involving administration, or by reason of new policies instituted by the General Assembly itself. If radical changes are made in laws involving administration through executive authorities, then the figures submitted would necessarily have to be revised to conform to the changed situation.

This department is convinced that legislation, in addition to that contained in the Civil Administrative Code, and supplemental thereto, is necessary to put the financial operation of the State on a sound business basis. A Finance Code should, in the judgment of the department, be enacted to embody the following principles:

- (1) A change of the commencement of the fiscal year from the first day of October to the first day of July;



(2) A provision for departmental allotment of funds before an appropriation becomes available for expenditure;

(3) The establishment of an industrial working capital fund for State penal institutions;

(4) Uniformity in the form, approval and certification of vouchers for disbursing funds under appropriations;

(5) Uniformity with reference to the period of availability and lapse of appropriations;

(6) Definitions of the several standard items of appropriation;

(7) General conditions attached to appropriations;

(8) Restrictions on purchases in excess of a given amount without plans and specifications and without advertisements for bids.

The principles suggested for a Finance Code are in harmony with general business practices. By their adoption, safeguards in the interest of the people will be thrown around the expenditure of public funds, while at the same time energy of administration will be promoted. Moreover, by the adoption of a Code containing such principles, each Appropriation Act would be made with reference thereto and would not carry, as Appropriation Acts do now, detailed restrictions. Such a code is in the interest of good administration.

Expedients of this kind would remove the incentive and the last lingering reason for detailed itemization of appropriations. Moreover, they would conduce to more efficient administration and better government.

The first State Budget is submitted with some temerity. In its preparation, while drawing freely on the limited experience of other states, the department was without precedent to guide. It is believed, however, that, with the facts and information collected, digested and analyzed by the department during the last two years, the appropriations at this session can be made more intelligently and with greater economy.

Respectfully submitted,

OMAR H. WRIGHT, *Director of Finance.*

WILLIAM H. McLAIN, *Supt. of Budget.*

## CHAPTER XXVI

### ECONOMIC AND SOCIAL PROBLEMS

#### 161. THE STATE POLICE POWER

The growing complexities of modern life require continually greater governmental regulation. Many regulations are made by the states or municipalities in the exercise of the police power for the promotion of the health, safety, morals and general welfare of the people. In the case of *Barbier v. Connolly*, decided by the Supreme Court of the United States in 1885, Justice Field, speaking for the court in upholding an ordinance of San Francisco prohibiting the operation of public laundries at night, made a classic statement of the scope of the state police power. In 1905 the court, by a divided vote, held that the state police power did not extend to the prohibition of the employment of any person in bakeries for more than ten hours a day. Among other justices who dissented in this case was Justice Holmes, whose dissenting opinion the court has virtually adopted in principle in later cases. In 1927 the same court, by a five-to-four decision, held invalid as violative of the Fourteenth Amendment a New York law which declared the charge for admission to theatres a matter affected with a public interest and forbade the resale of tickets of admission at a price in excess of fifty cents more than the price printed on the face of the ticket. The court held that the act could not be sustained as a valid exercise of the police power of the state. Mr. Justice Holmes, in his dissenting opinion, suggested the abandonment of the police power doctrine.

##### a. Scope of the Police Power

[*Barbier v. Connolly* (1885), 113 U. S. 27, 31-32; 28 L. Ed. 923, 924-925.]

Mr. Justice Field delivered the opinion of the Court: . . .

The 14th Amendment, in declaring that no State "shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and

property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the state, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.

#### b. Police Power and Individual Liberty

[*Lochner v. New York* (1905), 198 U. S. 45, 75-76; 49 L. Ed. 937, 949.]

Mr. Justice Holmes, dissenting:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not

conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. *Jacobson v. Massachusetts*, 197 U. S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. *Northern Securities Co. v. United States*, 193 U. S. 197. Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. *Otis v. Parker*, 187 U. S. 606. The decision sustaining an eight-hour law for miners is still recent. *Holden v. Hardy*, 169 U. S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word "liberty" in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily

would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

### c. Proposal to Abandon the Police Power Doctrine

[*Tyson v. Banton* (1927), 273 U. S. 418, 445-447.]

Mr. Justice Holmes, dissenting:

We fear to grant power and are unwilling to recognize it when it exists. The states very generally have stripped jury trials of one of their most important characteristics by forbidding the judges to advise the jury upon the facts (*Graham v. United States*, 231 U. S. 474, 480, 58 L. ed. 319, 342, 34 Sup. Ct. Rep. 148), and when legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. The former expression is convenient, to be sure, to conciliate the mind to something that needs explanation; the fact that the constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much; that some play must be allowed to the joints if the machine is to work. But police power often is used in a wide sense to cover and, as I said, to apologize for the general power of the legislature to make a part of the community uncomfortable by a change.

I do not believe in such apologies. I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the state, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain. Coming down to the case before us I think, as I intimated in *Adkins*

v. Children's Hospital, 261 U. S. 525, 569, 67 L. ed. 785, 801, 24 A. L. R. 1238, 43 Sup. Ct. Rep. 349, that the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. Lotteries were thought useful adjuncts of the state a century or so ago; now they are believed to be immoral and they have been stopped. Wine has been thought good for man from the time of the Apostles until recent years. But when public opinion changed it did not need the 18th Amendment, notwithstanding the 14th, to enable a state to say that the business should end. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. What has happened to lotteries and wine might happen to theaters in some moral storm of the future, not because theaters were devoted to a public use, but because people had come to think that way.

But if we are to yield to fashionable conventions, it seems to me that theaters are as much devoted to public use as anything well can be. We have not that respect for art that is one of the glories of France. But to many people the superfluous is the necessary, and it seems to me that government does not go beyond its sphere in attempting to make life livable for them. I am far from saying that I think this particular law a wise and rational provision. That is not my affair. But if the people of the state of New York speaking by their authorized voice say that they want it, I see nothing in the Constitution of the United States to prevent their having their will.

Mr. Justice Brandeis concurs in this opinion.

## 162. THE INJUNCTION IN LABOR DISPUTES

The issuance of writs of injunction by the courts has been a powerful weapon for employers in industrial disputes because it subjects employees on strike who commit acts of violence to the possibility of summary punishment for contempt by an equity court, ordinarily without the right to trial by jury. By the Clayton Act passed by Congress in 1914 an attempt was made to restrict the exercise of such power by the courts of the United States. Labor interests have secured the enactment in various states of laws which go further than the Clayton Act in prohibiting the use of the injunction in labor disputes, and in restraint of strikes and picketing, such as the Illinois Act of 1925. In view of the attitude of the courts towards such laws, it is doubtful whether their constitutionality will be generally

upheld. In 1921 the Supreme Court of the United States held unconstitutional the Arizona Anti-Injunction Act of 1913, but in this case important dissenting opinions were filed, including that of Justice Brandeis, an extract from which follows.

### a. Justice Brandeis on the Injunction

[*Truax v. Corrigan* (1921), 257 U. S. 312, 366-368; 66 L. Ed. 254, 279-280.]

In America the injunction did not secure recognition as a possible remedy until 1888. When, a few years later, its use became extensive and conspicuous, the controversy over the remedy overshadowed in bitterness the question of the relative substantive rights of the parties. In the storms of protest against this use many thoughtful lawyers joined. The equitable remedy, although applied in accordance with established practice, involved incidents which, it was asserted, endangered the personal liberty of wage-earners. The acts enjoined were frequently, perhaps usually, acts which were already crimes at common law or had been made so by statutes. The issues in litigation arising out of trade disputes related largely to questions of fact. But in equity, issues of fact, as of law, were tried by a single judge, sitting without a jury. Charges of violating an injunction were often heard on affidavits merely, without the opportunity of confronting or cross-examining witnesses. Men found guilty of contempt were committed in the judge's discretion, without either a statutory limit upon the length of the imprisonment, or the opportunity of effective review on appeal, or the right to release on bail pending possible revisory proceedings. The effect of the proceeding upon the individual was substantially the same as if he had been successfully prosecuted for a crime; but he was denied, in the course of the equity proceedings, those rights which, by the Constitution, are commonly secured to persons charged with a crime.

It was asserted that, in these proceedings, an alleged danger to property, always incidental and at times insignificant, was often laid hold of to enable the penalties of the criminal law to be enforced expeditiously without that protection to the liberty of the individual which the Bill of Rights was designed to afford; that through such proceedings a single judge often usurped the functions not only of the jury, but of the police department; that, in prescribing the conditions under which strikes were permissible and how they might be carried out, he usurped also the

powers of the legislature; and that, incidentally, he abridged the constitutional rights of individuals to free speech, to a free press, and to peaceful assembly.

It was urged that the real motive in seeking the injunction was not ordinarily to prevent property from being injured, nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men. In other words, that, under the guise of protecting property right, the employer was seeking sovereign power. And many disinterested men, solicitous only for the public welfare, believed that the law of property was not appropriate for dealing with the forces beneath social unrest; that in this vast struggle it was unwise to throw the power of the state on one side or the other, according to the principles deduced from that law; that the problem of the control and conduct of industry demanded a solution of its own; and that, pending the ascertainment of new principles to govern industry, it was wiser for the state not to interfere in industrial struggles by the issuance of an injunction.

...

#### b. The Illinois Anti-Injunction Act

[*Laws of Illinois, 1925, p. 378.*]

AN ACT relating to disputes concerning terms and conditions of employment.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

SECTION 1. No restraining order or injunction shall be granted by any court of this State, or by a judge or the judges thereof in any case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert, from terminating any relation of employment or from ceasing to perform any work or labor, or from peaceably and without threats or intimidation recommending, advising, or persuading others so to do; or from peaceably and without threats or intimidation being upon any public street, or thoroughfare or highway for the purpose of obtaining or communicating information, or to peaceably and without threats or intimidation persuade any person or persons to work or to abstain from working, or to employ or to peaceably and without threats or intimidation cease to employ any party to a labor dispute, or to recommend, advise, or persuade others so to do.

APPROVED June 19, 1925.



## 163. THE STATE POLICE

A considerable number of states have now created state police forces with general police powers, and the movement is growing. When once introduced, their benefits are usually so obvious that they are later strengthened and their functions expanded. The following extracts, from a recent book, describe in excellent manner the need for and functions of such police systems.

[B. Smith, *The State Police* (The Macmillan Company), pp. 1-2, 26-27, 47-51, 53-55, 57-59, 64-70.]

The American rural police system was founded in a time when this country was a wilderness, dotted here and there with settlements and hamlets. In the course of three hundred years a fundamental revolution has taken place in the life of the people who shaped that police system to meet their needs. There are now whole states in which the density of population per square mile is equal to that of some of the oldest nations of Europe. The entire country is knit together by a network of railways and improved highways that have literally wiped out county and state boundaries. Huge industrial cities have sprung up and spread their suburban and satellite towns for miles into surrounding counties and states. Great rural sections, without becoming cities in themselves, have been transformed into densely settled industrial areas. In some of the mining sections, farms with cultivated fields cover the superficial area, while mines containing whole armies of men are developed underground.

It is not necessary to multiply illustrations showing the radical character of the revolution wrought in American life since the establishment of our rural police system. To do this would be to document the obvious. And yet, in the midst of these revolutionary transformations, there has been no essential change in that system, except in those commonwealths that have begun to experiment with state police forces. It is in the light of these stupendous facts, and in this historical setting, that all efforts to deal with the new problems must be considered. . . .

The conclusions which may fairly be drawn from the foregoing are to this effect: the rural crime problem has changed, is still changing, and promises to become steadily more and more serious. The rapid improvement in means of communication and transportation has opened up new fields for the depredations of the city criminal by providing convenient access and ready means of escape. The sheriff-constable system, being but a rudimentary device, has failed to meet the situation satisfactorily. In some

cases there has been no attempt to make it efficient. The steady infiltration of alien elements into rural sections—elements which experience has shown and statistics prove to be especially troublesome from the standpoint of the police—has added still further to the difficulty. The sheriff and the constable have been brought into contact with a much larger number of people, native and foreign, of criminal intent or tendency, than ever before. And the prevailing system of rural police protection—the system rather than the individuals composing it—is conceded to have failed.

Responsibility for the condition which has arisen rests squarely upon the state government. Counties, towns, county divisions and districts, and the like, are created by the state for the furtherance of its own interests and as mere convenient agencies. This is especially true of the administration of justice. The criminal laws are for the most part state laws; offenders against them are arrested by officers acting for the state and in the name of the state. The sheriff and the constable, although selected by the local subdivisions of the state, have almost universally been held to be state officers. Removal by the governor or impeachment by the legislature is provided for the sheriff in a few cases. Nowhere, however, are the sheriff and the constable constituted as integral parts of the administrative machinery of the state. There is no intimate organic relationship between them, nor even closely related effort. . . .

The term "state police" does not carry any precise meaning. It is frequently applied to loosely organized reserves which may be called into active service in emergency, or to subordinate bureaus concerned wholly or chiefly with the enforcement of the motor vehicle laws, as well as to police agencies which in point of fact are really county organizations. These multiform instrumentalities have been created as a means for supplementing the peace officers traditionally associated with the administration of rural government. Their special significance lies in the recognition of the fact that, in the preservation of the peace, the state government has a duty to perform, a right to defend, and that there are interests to protect which require its intervention.

This study is directly concerned only with that type of state force comprising a numerous and permanent body of police officers who are clothed with general police authority, state-wide in its extent, and regularly exercised. As thus defined this category includes the state police of Massachusetts, Connecticut, New

York, New Jersey, Pennsylvania, West Virginia, Michigan and Texas. . . .

The jurisdiction of the state police rests upon a statutory basis. It is therefore fundamental to any discussion of the sphere and scope of these organizations. The members of the state police forces are vested with all general police powers possessed by sheriffs, constables, municipal police, or other peace officers in the state and are limited in a territorial sense only by the state's boundaries.

In Pennsylvania, New York, West Virginia, and New Jersey, the state police are also designated as fire, fish and game wardens; they may accordingly command the aid of all persons in extinguishing forest fires, and may search game bags without judicial warrant. In view of the continuous rural patrol which they perform and their direct responsibility to higher authority, there would appear to be no sound reason why these powers should not be extended in equal measure to the forces of the other states. The practice holds no concealed dangers.

Thus far no state police organization has been vested with the unrestricted right to command the *posse comitatus* or "power of the county," a privilege which is commonly conferred on sheriffs. In West Virginia, however, the state police are authorized to take command of all peace officers and the *posse comitatus* upon the request of the sheriff or the order of the governor. In Michigan, the commissioner of public safety may, with the governor's approval, demand the help of the local police, and in Connecticut any member of the force may request any sheriff, municipal policeman or constable to assist him, whereupon such officers become temporarily vested with statewide criminal jurisdiction, and are paid by the state as such. Members of the Connecticut force cannot, however, require any local officer to serve outside of his appropriate district without first receiving the consent of the governmental authority to which the local officer is subject.

The commissioner of public safety in Massachusetts, with the approval of the governor, may require the assistance of the Metropolitan Park Police, the administration of which is controlled by the state. The Texas Rangers are merely authorized to "accept the services of such citizens as shall volunteer to aid them." No provision whatever is made for special aid from either citizens or other police bodies in Pennsylvania, New York and New Jersey.

The right to call upon the *posse comitatus* has always been

carefully safeguarded and limited, and properly so. It was granted to the sheriff at a time when he was the direct representative of the Crown and a high and responsible dignitary. The centuries have brought many changes in the office, which now has descended a great way from its former high estate. Nevertheless, the sheriff still exercises this important power. In view of the responsibility which is placed upon the state executive for the preservation of the public peace, it would appear altogether reasonable that the governor should be authorized in grave emergencies to delegate the power of the county to the state police, as in West Virginia. It is also to be noted that in so far as state command over local police officers is concerned, the principle has already been accepted in Rhode Island, South Dakota, Alabama and Idaho, as well as in the states named above.

In addition to the foregoing powers, the state police have certain special duties and obligations placed upon them. Thus, in Michigan, the state police may be required to execute civil process to which the state is a party and are specifically made responsible for enforcement of the prohibition laws. West Virginia goes a step further and constitutes all members of the state force deputy prohibition officers, who, as such, shall be subject to the call of the state commissioner of prohibition. In Connecticut the state police are required to conduct road tests for all applicants for motor vehicle operators' licenses under the supervision of the commissioner of motor vehicles, and in New York they must "cooperate" with the latter in making certain inspections.

• • •

Though the jurisdiction of the state police is of the broadest nature, being in some instances extended to include activities which are beyond the ordinary scope of police administration, the legislatures of several states have imposed certain limitations upon the exercise of the powers which they have granted. Some of these are without special significance and constitute merely assurances that the force shall be employed in a proper and a legal manner, or declaration of a policy to that effect. Thus, in West Virginia, the state police are enjoined not to "interfere with the rights or property of any person except for the prevention of crime" and are prohibited from acting as election officials or detailing or ordering any member to duty near any voting precinct. The Colorado statute required that no member of the force should "participate in any political party caucus, committee, primary, assembly or convention . . . except to cast his ballot," and any member hiring himself to private parties was

declared guilty of a felony. Provisions such as these reflect not only legislative distrust of a compact and highly organized armed body, but also a past record of failure in the democratic control of public agencies other than the newly created state police.

Of somewhat greater influence and effect are those statutory provisions which limit the exercise of state-wide power with respect to riots and disorder. These without exception, have been introduced to meet the demands of organized labor and to disavow any intention of interfering arbitrarily with the lawful rights of participants in industrial conflicts.

The opposition of organized labor to state police forces rests largely upon two contentions. The first is that the state police are primarily intended for strike duty and that all other services and activities are subordinate to it. Whether or not this be true, the facts show that riot duty has not been a frequent function of the state police, except in Pennsylvania, New York and West Virginia, and that in these states it has not by any means consumed a major portion of their time. A second contention is that the state police employ harsh and sometimes brutal methods in dealing with strikers and certain specific instances are cited in support of this charge. . . .

Whether the claims of labor are or are not well-founded, the charge of brutality lodged against the state police does not really go to the root of the matter. Police brutality is a familiar charge, and one which is sometimes affirmatively established in the courts. Considering the nature of police work, no care and pains should be too great to prevent it, or successfully to prosecute it when the occasion demands. But it is not by any means confined to any particular kind of police force and does not in any way affect the considerations which require the continued existence of police bodies. The plain fact is that it is almost impossible to separate the arguments relating to the use of the state police in industrial disputes from the social and economic aspects of such disputes. This usually leads to irreconcilable conclusions based not upon considerations of public policy but upon the effect which police participation has upon the advancement of the interests or doctrines of the parties to the controversy.

The primary duty of any police department is to protect life and property, and, as a means to that end, to preserve the peace. It is a duty which cannot be evaded. The large powers conferred upon the police for the performance of this function must be applied without discrimination either as to individuals or as to

classes. They should therefore be applied without fear or favor in industrial disputes and without reference to the preponderating influence of either capital or labor in the disturbed area. Regardless of the immediate cause of the disorder—whether it arises from the agitation of strike leaders or from the provocative acts of company guards—and regardless also of the methods used by the police—there is great likelihood that the latter will be placed under suspicion of seeking to break the strike.

For example, a strike may be ordered and conducted in a peaceful manner for days, weeks or even months. No occasion for police intervention arises under these circumstances. But if the workers find that their cause is losing ground, or that the strike is proving to be more prolonged than they had anticipated, or if the company employs non-union labor, then intimidation and violence are very likely to result. Under disturbed conditions, in fact, riots may follow from causes only remotely related to the strike itself or to the activities of those engaged in it. If violence threatens the public peace, the local police force, the state police or even the militia may be called out to quell the disorder. The substitution of non-union labor for union labor is perfectly legal, and the police are bound to give protection against any and all interference with the right to work. The effective performance of this duty to protect, and if necessary to suppress disorders, frequently "breaks the strike," and the police, whether local or state, are charged with conducting a strike-breaking operation. At such times, evenhanded justice almost necessarily operates to the ultimate advantage of vested property rights. The problems involved are social and economic and their solution is not a matter which can be effected by any police force whatever its composition, direction, or authority.

However, there still remains the unquestioned fact that American communities are inclined to resent the use of outside force for the suppression of local disturbances. If all of these were able regularly to maintain order without other aid, the question might easily and satisfactorily be solved. Experience has shown, however, that actual and flagrant disorder has frequently required the interposition of the military power of the state or nation.

Where state police forces have been established, the state government has naturally employed them whenever local conditions seemed to require its intervention. The question has therefore been squarely raised as to what restrictions, if any, should be placed upon their use. . . .

In view of the responsibility which the state has for the protection of its citizens and their property, it is difficult to see how any further restriction can be placed upon the use of state agencies. Certainly the principle underlying certain amendments from time to time proposed by the state federations of labor offers no solution of the problem involved in the maintenance of public order. If the state police are not employed in a grave disturbance, the militia will be, unless the state government abdicates—and so a vicious circle is created. The fact may as well be recognized that while a police force requires careful provision for democratic control, the means employed to that end must be concerned with the organization of the force and the discipline of its personnel from top to bottom, rather than with serious restrictions on its powers as a peace-maintaining agency.

The activities of the state police fall into three main categories. Chief of these is the work of crime repression, which is accomplished by a system of regular rural patrols. Such patrols are conducted on the generally accepted theory that the frequent appearance of a peace officer acts as a "quieting" influence and serves to discourage certain types of offences, particularly those which are planned in advance of commission. These patrols are supplemented by the investigation of crimes reported to the police, in which the method is not to be distinguished from that of any city detective bureau, except that the work usually is performed by the uniformed force, and only rarely in plain clothes. A third group of services is of a heterogenous nature and represents for the most part the multiform aid and assistance rendered to other departments of the state government. Because the state police are widely distributed throughout the entire state and its members are in close and daily touch with local conditions, it is but natural that other administrative departments should turn to them for assistance. Here, ready to their hands, is a highly organized and relatively numerous body to which may be delegated the performance of certain duties which the department directly concerned is not equipped to perform. Reference has already been made to the difficulty that this practice may hold in store for the police, particularly where other departments retain administrative supervision over the delegated function. But keeping always in mind the fact that non-police functions cannot safely be added to the duties of the police without jeopardizing their utility as police officers, the experiments of a number of states in this field deserve consideration.

Thus far the state police have been eager to aid and to co-

operate with other state departments in performing duties which are not directly concerned with the enforcement of criminal statutes. This is particularly true of the forces which have been under heavy attack from organized labor, and in one or two cases there is good reason to believe that they have followed this policy as a means of strengthening their positions in the state government, and thereby becoming, so far as possible, indispensable to its administration. As a result it is common to find that extensive services are rendered to the department of health in the maintenance of quarantine and in protecting health officers engaged in making investigations; to the department of education in enforcing the compulsory education law; to the highway department in enforcing the laws prohibiting the over-loading of vehicles; to the agricultural department in assisting veterinary inspectors to detect infected cattle; and in reporting to the proper authorities the operation of common carriers and other licensed undertakings, which have not procured the approval and credentials prescribed by law. The only objection which can be raised against services of this nature is that they may become so numerous as to constitute a serious burden to the police department. But when the scope is widened still further to include elevator and building inspection, the care and custody of convicts, censorship of Sunday entertainments, inspection of the pollution of waterways by industrial refuse, the operation of ice-breakers in rivers and harbors, and the like, it may fairly be questioned whether there are not some limits to the sphere of police duty which should be both recognized in theory and adhered to in practice.

In addition to the foregoing, there are border-line cases, such as the procedure followed by the department of health in Pennsylvania in control of certain communicable diseases, by which one-third of the Pennsylvania state police force are designated as health officers, and employed from time to time in the apprehension and detention of persons suffering from venereal disease. In the same general category is the policy adopted in New York with respect to the examination of public halls and theatres in rural districts for the State Industrial Commission.

However closely allied these activities may be, and however important their effective enforcement from the standpoint of state administration, the fact remains that they cannot be performed to any considerable extent without reducing regular and systematic patrols to the disappearing point. All signs nevertheless point to a continuance of the pressure for an extension of such regu-



latory and inspectional work. If a distinction is to be drawn between the various types, it might well be recognized that only those duties should be delegated to the state police, which can reasonably be performed as a routine matter in the ordinary course of patrol. Whenever a special squad becomes necessary, or men are regularly diverted from patrol duty in order to serve other state departments, the process of patrol dispersion has commenced. . . .

Back of all such devices lies the very pronounced disposition of legislative bodies, both state and municipal, to widen the scope of governmental regulation without providing the funds which are necessary for effective supervision and enforcement. The police sphere is already so wide as to make it but a short step to add to it functions which are foreign to police duty. It is the cumulative effect rather than the accretions which threatens seriously to diminish the number of active patrolmen and to divert the attention of the remainder from what must always be the fundamentals of police work.

#### 164. CONSERVATION OF NATURAL RESOURCES

The conservation of our natural resources is a matter of vital importance which the National Government does not have constitutional power to cope with fully, nor can adequate measures in this respect be taken by the states acting separately. President Roosevelt, realizing that cooperative action between the national government and the states, and by the states with each other, is necessary in order successfully to deal with this problem, called a conference of governors of the states and territories which met in Washington in 1908 to consider the matter. At this conference the following declaration of principles was drawn up.

[*Proceedings of a Conference of Governors in the White House, Washington, D. C., May 13-15, 1908, pp. 192-194.*]

#### DECLARATION

We, the Governors of the States and Territories of the United States of America, in Conference assembled, do hereby declare the conviction that the great prosperity of our country rests upon the abundant resources of the land chosen by our forefathers for their homes and where they laid the foundation of this great Nation.

We look upon these resources as a heritage to be made use of in establishing and promoting the comfort, prosperity, and happiness of the American People, but not to be wasted, deteriorated, or needlessly destroyed.

We agree that our country's future is involved in this; that

the great natural resources supply the material basis on which our civilization must continue to depend, and on which the perpetuity of the Nation itself rests.

We agree, in the light of facts brought to our knowledge and from information received from sources which we can not doubt, that this material basis is threatened with exhaustion. Even as each succeeding generation from the birth of the Nation has performed its part in promoting the progress and development of the Republic, so do we in this generation recognize it as a high duty to perform our part; and this duty in large degree lies in the adoption of measures for the conservation of the natural wealth of the country.

We declare our firm conviction that this conservation of our natural resources is a subject of transcendent importance, which should engage unremittingly the attention of the Nation, the States, and the People in earnest cooperation. These natural resources include the land on which we live and which yields our food; the living waters which fertilize the soil, supply power, and form great avenues of commerce; the forests which yield the materials for our homes, prevent erosion of the soil, and conserve the navigation and other uses of our streams; and the minerals which form the basis of our industrial life, and supply us with heat, light, and power.

We agree that the land should be so used that erosion and soil-wash shall cease; that there should be reclamation of arid and semi-arid regions by means of irrigation, and of swamp and overflowed regions by means of drainage; that the waters should be so conserved and used as to promote navigation, to enable the arid regions to be reclaimed by irrigation, and to develop power in the interest of the People; that the forests which regulate our rivers, support our industries, and promote the fertility and productiveness of the soil should be preserved and perpetuated; that the minerals found so abundantly beneath the surface should be so used as to prolong their utility; that the beauty, healthfulness, and habitability of our country should be preserved and increased; that the sources of national wealth exist for the benefit of the People, and that monopoly thereof should not be tolerated.

We commend the wise forethought of the President in sounding the note of warning as to the waste and exhaustion of the natural resources of the country, and signify our high appreciation of his action in calling this Conference to consider the same and to seek remedies therefor through cooperation of the Nation and the States.

We agree that this cooperation should find expression in suitable action by the Congress within the limits of and coextensive with the national jurisdiction of the subject, and, complementary thereto, by the legislatures of the several States within the limits of and coextensive with their jurisdiction.

We declare the conviction that in the use of the natural resources our independent States are interdependent and bound together by ties of mutual benefits, responsibilities and duties.

We agree in the wisdom of future conferences between the President, Members of Congress, and the Governors of States on the conservation of our natural resources with a view of continued cooperation and action on the lines suggested; and to this end we advise that from time to time, as in his judgment may seem wise, the President call the Governors of the States and Members of Congress and others into conference.

We agree that further action is advisable to ascertain the present condition of our natural resources and to promote the conservation of the same; and to that end we recommend the appointment by each State of a Commission on the Conservation of Natural Resources, to cooperate with each other and with any similar commission of the Federal Government.

We urge the continuation and extension of forest policies adapted to secure the husbanding and renewal of our diminishing timber supply, the prevention of soil erosion, the protection of headwaters, and the maintenance of the purity and navigability of our streams. We recognize that the private ownership of forest lands entails responsibilities in the interests of all the People, and we favor the enactment of laws looking to the protection and replacement of privately owned forests.

We recognize in our waters a most valuable asset of the People of the United States, and we recommend the enactment of laws looking to the conservation of water resources for irrigation, water supply, power, and navigation, to the end that navigable and source streams may be brought under complete control and fully utilized for every purpose. We especially urge on the Federal Congress, the immediate adoption of a wise, active, and thorough waterway policy, providing for the prompt improvement of our streams and the conservation of their watersheds required for the uses of commerce and the protection of the interests of our People.

We recommend the enactment of laws looking to the prevention of waste in the mining and extraction of coal, oil, gas, and other

minerals with a view to their wise conservation for the use of the People, and to the protection of human life in the mines.

Let us conserve the foundations of our prosperity.

## 165. CONSTITUTIONALITY OF SOCIAL AND INDUSTRIAL LEGISLATION

With the growth of industry and the increasing congestion in population have come numerous problems in social and industrial relationships. These problems are difficult enough to remedy in themselves, but their solution is made the more difficult because the state and national constitutions were for the most part framed to fit other social conditions. Hence the question of constitutionality is commonly raised in connection with such social and industrial legislation. It is almost impossible to lay down any certain principles to determine the scope of state power in dealing with these problems; but an excellent review of the general situation was drawn up for the benefit of the Illinois Constitutional Convention that met in that state in 1920. Although applicable particularly to Illinois, the question of constitutionality may be considered to be, on the whole, similar in the several states.

[*Illinois Constitutional Convention Bulletins, 1920, pp. 1130-1137.*]

In every large industrial state of this country, certain types of legislation have been held invalid as violating broad constitutional guarantees, such as that with respect to due process of law. The Ohio constitutional convention of 1912 proposed several amendments whose purpose was to establish a policy in the state different from that announced by the Ohio supreme court before 1912. Of the amendments adopted by the people of Ohio in 1912 the following four at least were of this character: (a) A constitutional provision authorizing the legislature to pass mechanics lien laws. (b) An amendment authorizing legislation "fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees." (c) A constitutional provision expressly authorizing compulsory workmen's compensation legislation. (d) An express provision that except in cases of extraordinary emergency a day's labor on public works carried on or aided by the state or by any political subdivision thereof should not exceed eight hours a day or forty-eight hours a week.

Prior to 1912 judicial decisions in Ohio had held invalid regulations with respect to mechanics liens and also with respect to the limitation of hours of labor upon public works. There had also been a judicial decision holding it improper for the legislature to require the screening of coal in connection with the pay-

ment of wages to miners. The other provisions above referred to were inserted into the Ohio constitution in 1912, because it was feared that the court might hold certain types of legislation unconstitutional, unless such legislation were explicitly authorized by the constitution.

The present constitution of Illinois does not contain a great many provisions similar to those just referred to as having been inserted into the constitution of Ohio in 1912. However Article 4, section 29, is similar in character. This section reads "It shall be the duty of the General Assembly to pass such laws as may be necessary for the protection of operative miners by providing for ventilation, when same may be required, and the construction of escapement shafts, or such other appliances as may secure safety in all coal mines, and to provide for the enforcement of said laws by such penalties and punishments as may be deemed proper." This constitutional provision seems from certain decisions of the court to vest in the General Assembly a wider power as to legislation for the safety of miners than with respect to other types of labor legislation.<sup>1</sup>

By amendment in 1886 a provision was added to the constitution that: "Hereafter it shall be unlawful for the commissioner of any penitentiary, or other reformatory institution in the State of Illinois to let by contract to any person, or persons, or corporations, the labor of any convict confined within the said institution."

Certain types of legislation are clearly valid under the present constitution, and as to them no constitutional authorization is necessary. On the other hand, if it is already recognized that a certain type of legislation may be validly enacted, placing a provision in the constitution regarding it is likely to operate as a limitation upon legislative power with respect to that type of legislation. State constitutional provisions are normally construed as limitations upon legislative power, and if a provision is placed in the constitution which was unnecessary as a means of granting legislative power, that provision will be interpreted as limiting the power of the legislature. An important example of this will be found in Nebraska. The framers of the Nebraska Constitution of 1875 placed in that instrument an authorization for the establishment of reform schools for children under the age of sixteen years. The legislature later desired to extend the age of children who might be committed to a reform school, but this was held improper, the court saying that the legislature

<sup>1</sup> *Starne v. People*, 222 Ill. 189 (1906).

would have had full power with respect to reform schools in the absence of constitutional provision, but that the constitutional provision must have intended to limit the legislative power as to the type of reform school that might be established.

It may be worth while to review briefly the types of legislation whose validity has been, or is likely to be, sustained:

(a) It is clearly proper under the present constitution for the General Assembly to enact legislation regarding the hours of labor of women. This principle has been fully established by the case of *Ritchie v. Wayman*, 244 Ill. 509 (1910), and *People v. Elderding*, 254 Ill. 559-579 (1912). It is true of course that in the earlier case of *Ritchie v. People*, 155 Illinois 198 (1895) the Supreme Court of Illinois held unconstitutional an eight-hour labor law for women. However, in the later case the Supreme Court substantially departed from its attitude in the first *Ritchie* case, although it should be understood that the first *Ritchie* case arose under an eight-hour labor law for women, whereas the second case arose under a ten-hour law. No legislation has been enacted in Illinois which reduces the labor of women below ten hours a day. Yet, in view of the case of *Miller v. Wilson*, 236 U. S. 373 (1915) it may be suggested that eight-hour labor legislation for women would probably be upheld by the Illinois Supreme Court. In this matter the court would probably follow the ruling of the United States Supreme Court.

(b) Hours and conditions of labor of children. The prohibition of child labor and the strict regulation of hours and conditions of labor of children are matters as to which legislation is now pretty clearly constitutional. Legislative power with respect to children is much greater than with respect to adult males or adult females, and there was a clear pronouncement in favor of the constitutionality of legislation for children in a recent case which went to the United State Supreme Court from the state of Illinois (*Sturgis v. Beauchamp*, 231 U. S. 320).

(c) Workmen's compensation. Ten years ago there was serious doubt as to the constitutionality of compulsory workmen's compensation laws, and the New York Court of Appeals in the case of *Ives v. South Buffalo Railroad Company* (201 N. Y. 271) expressly held such legislation unconstitutional. An amendment to the constitution of New York was adopted permitting workmen's compensation legislation in that state, and similar amendments have been adopted in a number of other states. However, such constitutional provisions seem now unnecessary in view of the fact that compulsory workmen's compensation legis-

lation has been upheld by the United States Supreme Court in the recent case of *New York Central Railroad Co. v. White*, 243 U. S. 188 (1917). Since 1917 compulsory workmen's compensation legislation for hazardous employments has been in force in Illinois, and this legislation has not been contested in the courts.

(d) Safety appliances legislation. Illinois has had for a number of years a large amount of legislation regarding safety in factories and in mines. Safety legislation for mines is expressly authorized by the constitution of 1870, but safety legislation with respect to factories and other industrial establishments is sustained generally in this and other states under the police power, independently of any express authorization. With respect to safety legislation there is probably no need whatever of constitutional authorization. It is true that some cases in this state imply a doubt as to the validity of such legislation, but the doubt when expressed by the court has been based not upon the character of the legislation as a whole but upon some element of improper classification. Legislation for the prevention of occupational diseases is also clearly within the police power, and such a case as *People v. Schenck*, 257 Ill. 384 (1913) is based not upon the invalidity of such legislation in general, but upon a classification which was claimed to be improper. In that case the Supreme Court took the view that it was improper to prohibit the use of emery wheels or emery belts in any basement.

(e) The contracting for the use of convict labor is now prohibited by the constitutional amendment of 1886, and this matter is therefore perhaps sufficiently covered by express constitutional provisions. However, some effort may be made to place in the constitution a further provision prohibiting the placing of convict-made goods in competition in any manner with goods manufactured by free labor.

(f) There may be some doubt as to the validity of minimum wage legislation, if such legislation were enacted in the state of Illinois. In the case of *Stettler v. O'Hara* (243 U. S. 629) the United States Supreme Court by an equal division sustained minimum wage legislation for women and children. The court was equally divided in this case because Mr. Justice Brandeis had been the counsel supporting the validity of the law before he became a member of the United States Supreme Court. It is therefore fairly clear that a majority of the federal Supreme Court are in favor of the constitutionality of minimum wage

legislation for women and children.<sup>1</sup> The fact that the United States Supreme Court may sustain the validity of the minimum wage legislation does not of course necessarily mean that the validity of such legislation would be sustained by a state supreme court. The State Court is the final interpreter of the broad guarantees contained in a State Constitution, and may, if it sees fit, hold legislation unconstitutional as violative of due process of law, even though such legislation has been held not violative of the due process of law guarantee of the Federal Constitution.

Minimum wage legislation for men would be of doubtful validity in either the state courts or the United States Supreme Court. The case of *Wilson v. New*, 243 U. S. 332, which upheld the wage provisions of the Adamson Law, was clearly based upon a specific emergency and it would probably not be wise to reason from that case to any general view in favor of the validity of minimum wage legislation for men.

The discussion above has related to legislation which is either clearly constitutional or which would probably be held constitutional by the Supreme Court of Illinois. In a number of cases, legislation upon other matters has been held unconstitutional by the Supreme Court and it is possible to say that certain other types of proposed legislation not yet enacted in Illinois would be held invalid if they were enacted. A brief review should be given of types of legislation which would probably be held invalid.

(1) In another chapter of this bulletin will be found a full discussion of the problem of injunctions in labor cases, and of the legislative power to limit the authority of courts to punish for contempt in such cases. As has been indicated, legislation with respect to these matters has been enacted by Congress and by a number of state legislatures. On the other hand legislation of this character has been held improper in California, Massachusetts and New Jersey, and the judicial decisions of this state seem to lead to the conclusion that such legislation would be held invalid in this state under present state constitutional provisions.

(2) Legislation regarding the payment of wages, particularly that requiring the payment of wages in cash and that requiring

<sup>1</sup> Since this was written the United States Supreme Court (in 1923) declared unconstitutional the minimum wage law of the District of Columbia, in so far as it applied to adult women (*Adkins v. Children's Hospital*, 261 U. S. 525). Two years later this decision was reaffirmed and applied to state legislation as well, when the Court declared unconstitutional the Arizona minimum wage law (*Murphy v. Sardell*, 269 U. S. 530).



coal to be screened in the payment of wages to miners, has been held unconstitutional in this state. The Supreme Court of Illinois has been pretty definitely of the view that legislation regulating the payment of wages in this manner is unconstitutional. The leading cases upon this matter are cited in a note.<sup>1</sup> Legislation of this character has been upheld by the U. S. Supreme Court, as not violative of due process of law, and there has been some tendency for courts which have once held such legislation invalid to change their view. However a large mass of possible legislation regarding the payment of wages is now unconstitutional in Illinois.

A proposed amendment to the constitution of Illinois was submitted to the people in 1894. This proposal read as follows: "That the general assembly shall have power and it shall be its duty to enact and provide for the enforcement of all laws that it shall deem necessary to regulate and control contracts, conditions and relations existing or arising from time to time between corporations and their employes." The affirmative vote on the proposal was 153,393, and the negative vote 59,558, but the amendment failed because not receiving a majority of the votes cast at the election.

(3) Hours of labor of men. In the case of *Lochner v. New York* (198 U. S. 45) the United States Supreme Court held invalid a law which limited the hours of labor in bakeries to ten hours a day. The same court in the earlier case of *Holden v. Hardy* (198 U. S. 366) held a limitation of the hours of men in mines and smelters constitutional, on the ground that labor in mines and smelters was hazardous and that the hours might be limited in such employments. The *Lochner* case was distinguished from *Holden v. Hardy* on the ground that labor in bakeries was not hazardous or unhealthful. In the case of *Bunting v. Oregon*, 243 U. S. 426 (1917) the United States Supreme Court upheld an Oregon law which definitely limits the hours of labor of men, and practically departed from the view expressed in the *Lochner* case. The Oregon law was a general ten-hour law, but was applied to establishments which had under other legislation been classed as hazardous, although all the employments to which it was related were not hazardous in the strict sense of the word. In view of the *Bunting* case, it is probably now true that the United States Supreme Court would uphold

<sup>1</sup> *Millet v. People*, 117 Ill. 294 (1886); *Fraser v. People*, 141 Ill. 171 (1892); *Ramsey v. People*, 142 Ill. 380 (1892); *Braceville Coal Co. v. People*, 147 Ill. 66 (1893); *Harding v. People*, 160 Ill. 456 (1896); *Kellyville Coal Co. v. Harrier*, 207

legislation restricting the hours of labor of men, although such legislation might be of doubtful validity if the hours were limited beyond ten hours a day.

It has now come to be generally recognized in this country that a state legislature may limit the hours of labor upon public works, whether such public works are conducted by the state or by a political subdivision of the state. Such legislation was upheld by the United States Supreme Court in the case of *Atkin v. Kansas*, 191 U. S. 217 (1903). In New York, California, Ohio and other states, legislation limiting the hours of labor of men upon public works was held invalid by state courts, and such decisions have led to constitutional provisions prescribing an eight-hour day upon public works in New York, Ohio, California, Arizona, Colorado, Idaho, Montana, New Mexico, Oklahoma, Utah and Wyoming.

No legislation has been expressly enacted in Illinois limiting the hours of labor upon public works, but decisions of the Supreme Court of Illinois upon municipal contracts have made it clear that an Illinois court would regard such legislation as invalid. In the case of *Fisk v. People*, 188 Ill. 206 (1900) the Supreme Court took the view that the requirements of union labor and of an eight-hour day in municipal public works were invalid, and the attitude of the court pretty clearly indicated that it regarded such regulation as not merely beyond the power of the city but also as unconstitutional. In the case of *McChesney v. People*, 200 Ill. 146, the Supreme Court took the same view as to contract provisions fixing the eight-hour day and prohibiting alien labor. If it is desired to permit a statutory fixing of the hours of labor upon state and municipal public works, this would seem to require a constitutional change in this state.

(4) Legislation making exceptions in favor of union labor with respect to matters of discharge or with respect to employment is pretty clearly not permitted by the constitution of Illinois as now interpreted. In the case of *Gillespie v. People*, 188 Ill. 176 (1900), the Supreme Court held unconstitutional legislation which sought to make it a criminal offense for an employer to attempt to prevent his employes from joining labor unions, or to discharge them because of their connection with labor unions; and this view is also substantially taken by the United States Supreme Court in the recent case of *Coppage v. Kansas* (1915). Legislation of this character would probably be invalid under the constitution of the United States even though there were a state constitutional provision expressly authorizing it.

In the case of *Matthews v. People*, 202 Ill. 389 (1903), the Supreme Court held unconstitutional a provision of the Free Employment Agency Act which prohibited superintendents of agencies from furnishing workmen or lists of workmen to employers whose men were either on a strike or locked out, the court taking the view that this created an unjust and unequal classification.

In the case of *Fisk v. People*, 188 Ill. 206 (1900) the court squarely took a view against the validity of an ordinance discriminating in favor of union labor upon local public works and said: "Under our constitution and laws, any man has a right to employ a workman to perform labor for him whether such workman belongs to a labor union or not, and any workman has a right to contract for the performance of labor irrespective of the question whether he belongs to a labor union or not." The case of the *City of Chicago v. Hulbert*, 205 Ill. 346 (1903) should also be cited in this connection, although the matter here related to the terms of an Act prohibiting the employment of aliens upon public works.

(5) In the case of *Josma v. Western Steel Car and Foundry Co.*, 249 Ill. 508 (1911), the Supreme Court of Illinois held invalid legislation penalizing the employment of laborers from another community by misrepresentation as to the conditions of employment or the existence of a strike, saying that there was no distinction in this matter between laborers in another community and those in the same community, and that the classification was therefore invalid. A contrary view was taken by the Supreme Judicial Court of Massachusetts in the case of the *Commonwealth v. Libbey*, 216 Mass. 256 (1914). If legislation of the character held unconstitutional is desired in this state, a constitutional amendment for the purpose may be proposed, although it would seem possible to draft a law in such a way as to meet the objection raised by the court. If, as is contended by those favoring such legislation, the evil aimed at exists only with respect to the deceiving of laborers in another community, no harm would result from the passage of legislation applicable to such deceit, irrespective of where the laborer might be.

(6) The subjects of old age and sickness insurance are discussed elsewhere in this bulletin. It is probable that constitutional provisions would be necessary to permit the enactment of legislation upon these subjects.

(7) Legislative power under the present constitution is pretty clearly not sufficient to authorize the state or its political sub-

divisions embarking upon the construction of houses or upon numerous other types of governmental enterprises. A wide expansion of authority with respect to governmental undertakings has taken place in Arizona, Oklahoma, North and South Dakota, and a constitutional amendment has recently been adopted in Massachusetts authorizing the state in times of emergency to engage in the furnishing of certain necessities. Municipal debt limitations in the present constitution would oftentimes prevent the engaging in industrial enterprises, even if constitutional provisions were construed not to prohibit such enterprises; but if it is desired to have the state or its political subdivisions embark upon the enterprises here under discussion, constitutional changes will probably be necessary.

(8) A constitutional amendment was adopted in Massachusetts in 1918 authorizing the control of billboards and public advertising. A similar proposal was rejected by the people of Ohio in 1912. These matters are commented upon in Bulletin No. 7, upon eminent domain and excess condemnation. A constitutional change may be necessary if it is desired to regulate this matter by legislation although a recent decision of the Supreme Court of the United States has gone far towards sustaining the regulation of billboards, and this case went to the federal Supreme Court from the state of Illinois. (*Cusack v. Chicago*, 242 U. S. 526).

(9) Projects for the conservation of natural resources are now to a large extent within the state constitutional authority. Here again the problem is in part one of financing such projects, and this matter may require constitutional action if wider state and municipal powers are desired.

(10) The Court of Appeals of New York has sustained legislation limiting the night labor of women (*People v. Schweinler Press*, 214 N. Y. 395), and also legislation requiring a weekly day of rest in certain occupations.<sup>1</sup>

The labor party of Illinois desires that a new constitution "charge the legislature with the duty of providing by law for the reorganization of industries, impressing upon industries a co-operative character and providing for collective bargaining and for the election of labor members to boards of directors." It is questionable whether under the United States constitution legislation would be valid which interfered with the management of private industry and required the election of labor members to boards of directors of corporations. An economic ten-

<sup>1</sup> *People v. Klineck Packing Co.*, 214 N. Y. 121 (1915).

dency in the direction of greater co-operation between employers and employes in the management of industries is becoming apparent, and it may be that the courts will come to recognize the validity of legislation requiring such co-operation. It should of course be remarked that this matter has not been passed upon by the federal Supreme Court, and that future action in this field might be sustained, if taken. With respect to co-operative enterprises future legislation in Illinois has already done something by way of encouragement, and in the chapter of this bulletin dealing with corporations will be found a further comment upon the problem of co-operative organizations.

Certain decisions of the Supreme Court of Illinois have been subjected to criticism, but do not prevent legislation in the field to which they apply. For example the case of *Starne v. People*, 222 Ill. 189 (1906) held invalid an act requiring washrooms in mines, but the legislation was held invalid upon the ground of an improper classification and later legislation upon the same matter has been upheld by the Supreme Court of Illinois (*People v. Solomon*, 265 Ill. 28, 1914). The case of *Massie v. Cessna*, 239 Ill. 352 (1909) held unconstitutional an act regarding the assignments of wages as security for money loans, but did not prevent legislation in this field.

## CHAPTER XXVII

### LOCAL RURAL GOVERNMENT

#### 166. PROCEEDINGS OF A TOWN MEETING

The town meeting, or general gathering of the adult men of the town, is the classic example of pure democracy in this country. It was in no sense a representative body but rather a primary assembly of all the men in the town. It has had its greatest use and development in New England, but has also been widely used throughout the West. The following selections will give some idea of the nature of the proceedings at such meetings.

##### a. Town Meeting in Massachusetts

[*Records of the Town of Duxbury, Massachusetts, from 1642 to 1770* (Plymouth, 1893), p. 241.]

At a town meeting in Duxborough upon the 15th day of May, Anno Domini 1735. The said town chose Capt. John Alden their representative to serve at the General Court the ensuing year, they also chose Capt. Alden moderator for the said day, and Joseph Freeman petty Juror to serve at the next Inferior Court at Plymouth. The said town also voted that Thomas Burton should keep their school the year ensuing or so much of said year as he shall tarry in said town, and not remove out of it, and also voted that said Thomas Burton should not receive pay from the town for the time he did not attend keeping the said school.

##### b. Town Meeting in South Dakota

[*Minutes of the Proceedings of Town Meeting of Edison Township, Minnehaha County, South Dakota* (mss.).]

At the annual town meeting held in the Town of Edison in the county of Minnehaha and State of So. Dakota at the Stephenson School house on the first day of March 1892.

The meeting was called to order by C. H. Wangsness.

C. H. Wangsness, A. J. Berdahl, and W. W. Coon were then chosen Judges of Town Meeting and A. A. Grinde was then chosen to preside as Moderator of the meeting.

The Moderator at the opening of the meeting stated the busi-

ness to be transacted and order of the same, as follows. That the business to be transacted would be to elect three Supervisors one of whom should be designated on the ballots as Chairman, one Town Clerk, one Treasurer, one Assessor, two Constables, and one Overseer of Highway for each road district in said town. And to do any other business proper to be done at said meeting.

That the said business would be entertained in the following order, first—the election by ballot of town officers. Second—at one o' P. M. election of overseer of Highway for each road district in the Town. Third—that immediately following the election of overseers of Highways the general business of the town would be taken up and proceeded with until disposed of.

It was then on motion Resolved that the compensation of Town Officers elected at this meeting shall be Two dollars per day.

Proclamation of opening the polls was then made by the moderator, and the polls opened and the election of Town officers proceeded.

The hour of one o'clock having arrived, and the general business of the town being now in order, the following named persons were elected by ayes and noes. Overseers of Highway for the ensuing year in the following road district, viz.

B. S. Hove, road district no. one.

Jno. Gullickson, road district no. two.

P. L. Hatlestad, road district no. three.

Jno. Crowson, road district no. four.

The Town clerk read publicly the report of the board of auditors and an estimate of the sums necessary for the current and incidental expense of the town for the ensuing year.

On motion it was ordered that the following sums of money be raised by tax upon the taxable property in said Town for the following purposes for the current year:

For General township purposes 1 mill.

For Incidental expenses  $\frac{1}{2}$  mill.

For Road fund 2 mills.

On motion it was resolved that the Supervisors are instructed and empowered to build a bridge between section 19 and 30 on the Slip-up stream.

On Motion it was resolved that the Supervisors and Jno. Power confer with the county commissioners about a bridge at Fuller's and receive pay accordingly. On Motion it was resolved that

it be the duty of the overseers of the several road districts to see that all weeds are mowed on bridges, culverts and grades on highway.

On Motion it was resolved, That the town treasurer be instructed to call on the Co. Treas. and see that the town receive the dog tax. On Motion it was resolved that the chairman of Supervisors confer or give a written notice with Chairman of Palisades township that the Russian thistle must be destroyed, or the case will be placed in the county attorney's hands.

On Motion it was resolved that the town board see that 3 inch plank be put in on all culverts, and stone culverts be put where they thought advisable.

The next annual town meeting was ordered to be held at School house Dist. no. 101 and the same place was designated for holding the next General Election in the town.

At five o'clock the polls were closed—proclamation thereof being made by the moderator, the Judges then proceeded to publicly canvass the votes and the person having the greatest number of votes for the respective office voted for were declared elected.

Statement of results of canvass: the following is a statement of the results of the canvass by ballot for the election of officers at the annual Town Meeting in the town of Edison, County of Minnehaha and State of South Dakota Meh 1<sup>st</sup> 1892 as publicly canvassed by the Judges at said Meeting.

C. H. Wangsness received 49 votes for chairman of Supervisors and was declared elected.

A. J. Berdahl recd. 48 votes and W. W. Coon recd. 46 votes for Supervisor, and each were declared elected Supervisors.

Geo. E. Millard received 46 votes for Town Clerk.

A. A. Grinde received 1 vote for Town Clerk.

Geo. E. Millard was declared elected Town Clerk.

A. A. Grinde received 12 votes for Treasurer.

Ole J. Berdahl recd. 36 votes for Treasurer.

Ole J. Berdahl was declared elected Treasurer.

A. H. Stephenson received 46 votes for assessor.

Stephen Hanson received 1 vote for assessor.

S. Lem Fry received 1 vote for assessor.

A. H. Stephenson was declared elected assessor.

H. J. Berdahl received 48 votes for constable.

C. J. Millard received 43 votes for constable.



Andrew Stephenson received 1 vote for constable.

H. J. Berdahl and C. J. Millard were declared constables.

On Motion the meeting adjourned without day.

C. H. WANGSNES

A. J. BERDAHL

W. W. COON

GEO. E. MILLARD

Clerk

Judges

## 167. COUNTY GOVERNMENT IN NEW YORK

County government in the United States is commonly referred to as the "dark continent" of the American political system. Governor Smith of New York, in a special message to the legislature in 1926, described the system of local government in that state in a remarkably lucid manner. Although specially applicable to New York, his characterization would apply in the main to county government throughout the United States, and emphasizes the need for reorganization.

[Text of message reprinted in *New York Legislative Document* (1926), no. 80.]

State of New York,  
Executive Chamber,

Albany, March 15, 1926.

To the Legislature:

In my annual message I referred to the need of a full and comprehensive study of county government throughout the State, looking toward consolidation and internal reorganization.

We have made an excellent start toward the establishment of State government on a sound basis. We ought now to give our attention to the problems of county, town and local government, and to see that we rebuild and modernize a machine which is over 200 years old.

There is nothing new in this subject. A special committee of the Constitutional Convention of 1915 devoted considerable time to this problem. It concluded that the single, rigid type of county government existing in this State without change for over two centuries and frozen into the State Constitution was entirely obsolete. The Constitutional Convention said that the conditions were worst in the more populous counties, where modern conditions of housing, transportation, welfare, justice and public improvements had put an intolerable strain upon a framework of government based on county, town and village conditions of 200 years ago. The Constitutional Convention concluded that an amendment to the Constitution was necessary to bring about

any improvement, and the amendment which was incorporated in the proposed new Constitution provided that the Legislature might classify counties and set up different types of government for different classes of counties, but that no new form of government should be imposed upon a county without its approval.

The convention also favored county home rule by providing that no local laws affecting a county should be adopted excepting upon the request of the county authorities. After the failure of the Constitution of 1915 the Counties of Nassau and Westchester made active efforts to bring about amendments to the Constitution which would enable them to modernize their forms of government. Both of these counties appointed charter commissions, and after many years of agitation a special amendment affecting these two counties only was adopted by the people in 1921. Since then charters have been submitted to the voters of both of these counties and disapproved, and new charters are about to be submitted again with amendments calculated to make them more acceptable to the electorate. It should be noted that in both of these counties, especially in Westchester, although there have been differences of opinion as to the new forms of government, intelligent people generally agree that the existing forms cannot stand up much longer under the pressure of present-day conditions.

From 1921 to 1923 a special joint Committee on Taxation and Retrenchment of the Legislature made a study of the tax and government problems of this State. This committee, under the chairmanship of Senator Davenport, made a very thorough study of county, town and village government, and submitted to the Legislature of 1923 a report which concluded that it was costly, wasteful and obsolete and that it needed complete reorganization. They pointed out that most of the aspects of these local governments had not been altered since the Provincial Government of New York was established after the Dutch were driven out in 1664.

In other words, we are living today, as far as county and town government are concerned, under the laws promulgated by the Duke of York in 1676. Town officers elected today are almost without exception the same town officers who were elected before 1700. The only change made since then in town government has been the authorization to create special districts for special purposes, such as sewers, fires, sidewalks, &c., and even these districts were created without any understanding of the results which would follow, because they overlap one on the

other and set up within one township all sorts of overlapping special governments and special tax districts. It was not until 1925 that the old bridges maintained by the towns on the State highways were taken over by the State.

The special joint committee also referred to the fact that many town functions should be transferred to the county. It called attention to the inadequate highways and roads which are being built by the towns, the fact that numerous Justices of the Peace without legal training were attempting to administer justice in large communities without any training or qualifications for this work and at the same time sitting as members of the Town Board in an administrative capacity. The committee showed how hopelessly out of date are the elected town constables and coroners. The ineffectiveness of small, scattered and overlapping health districts was referred to and the impossibility of securing competent health officials for such small districts on part time and for inadequate compensation.

It was shown that the charity and poor law system has broken down in the larger counties. Particular attention was drawn to the great difference in the conditions of life and government in the various counties of the State, some being primarily urban and suburban or built around one large city, and others being rural and having only a few small cities or large villages, still others being entirely rural or forest counties of scattered population in which conditions today are not unlike those in the time when county and town government was first established.

The Joint Committee on Taxation and Retrenchment, like the Constitutional Convention, concluded that no permanent improvement could be made without a constitutional amendment, since the present Constitution provides a single, rigid, obsolete form of government for all counties, excepting Westchester and Nassau. Amendments were submitted by this committee in 1922 and 1923. The amendment of 1922 extended the Nassau-Westchester amendment to all counties of over 100,000 inhabitants, permitting them to change their forms of government. The amendment of 1923 extended the Nassau-Westchester amendment to all counties irrespective of size, excepting those in New York City.

The Committee on Taxation and Retrenchment did not include the counties within New York City in its study, and every agency, official and unofficial, which has studied these counties agrees that there is no need of the elaborate, independent governments within the City of New York which have been set up by

the five counties. As a matter of fact, the City Government should have complete control over these counties and this should have been provided in the Home Rule amendment.

It is interesting to note in connection with the general agreement as to what is wrong with our county government that these conclusions have been reached irrespective of politics. Republicans and Democrats in the Constitutional Convention of 1915 agreed on it. The Republicans and the Democrats on the special Committee on Taxation and Retrenchment agreed on the subject. Governor Miller in his message to the Legislature of 1922 said that the county government amendment applying to Westchester and Nassau was needed in every county of the State.

There are further evidences on this subject. Heads of departments in the State Government have repeatedly called my attention to all sorts of defects in county, town and village government, and have stated that it is the weakest, most ineffective and most wasteful part of the whole government machinery. The Health Commissioner has frequently complained about the inadequate small health districts of the villages and towns and has stated that there should be a county health unit. Practically all of the health experts and organizations agree with him.

The charity and welfare authorities make similar complaints. The public works and highway authorities tell me that the town roads are a disgrace, that they cannot possibly stand up under the pounding of present-day traffic, and that a good part of the State aid given to the towns is thrown away. They point to the town bridges on State highways recently taken over by the State as an illustration of what happens when a matter which has become regional or State-wide is left to local people with inadequate funds and local ideas of economy to take care of.

Members of the bar, especially in the larger and more populous counties, have repeatedly stated that the present Justice of the Peace system under which a county like Westchester has seventy-six lay Justices is a farce in these days. It was all right and may today still be useful in very thinly settled counties where there are few cases and few lawyers, and where a local man of standing, even if he has no legal training, can well take care of the small matters that come up from day to day. In the larger counties, with complicated problems and plenty of people trained in the law, and with the factor of distance completely minimized by modern conditions of travel, a small, full-time circuit court of real Judges is the obvious remedy.

The members of the Tax Commission and tax experts unani-

mously agree that our local tax system in the towns, counties and villages is a good deal of a joke. The county and town tax system, which also provides for the State and school tax, and the tax for special districts, is unscientific, inequitable and wasteful, where it is not worse. Numerous part-time, unqualified tax collectors with all kinds of views as to assessment are attempting to assess property of tremendous value without any proper central county control.

The village tax system, which is entirely independent of the county and town system, is often based on totally different theories of assessment, and the actual assessment for a single piece of property by a village and by the town in which it is located often varies greatly. Similarly tax authorities point out that local tax collections should be consolidated and proper records maintained. It is certainly a ridiculous thing that in order to change the present system under which there are three elected town assessors and to substitute a single paid town assessor or a county board of assessors it is necessary to amend the State Constitution.

One of the most ridiculous things in government is to read the reports of the State Tax Commission and find that local tax assessors, who are required by law to assess for full value and to take an oath that they have done so, actually assess in many cases for 20 and 30 per cent. of the value, with the result that in the more obvious cases which can be discovered the State Tax Commission has to attempt to make the necessary readjustments. It appears that the manual of instructions for assessors issued by the State Tax Department is a good deal of a joke to the local town and village assessors.

The Joint Committee on Taxation and Retrenchment in 1923 pointed out one interesting little case of a village which had grown little in population or improvement and in two years increased its assessments from less than \$100,000 to over \$1,700,000. The reasons for the increase are not known. The interesting fact is that in the same two years the town assessments for an area vastly greater and including the village remained stationary at about \$1,000,000. It is also an interesting fact that practically all tax authorities agree that city assessments are fairly scientifically and accurately made and are based on a substantial percentage of true value.

The State Commission on Housing and Regional Planning has pointed out to me the absence of anything like adequate county planning throughout the State. At the present time there is not

a single county planning and zoning board and only the beginning of a town planning system. Half a dozen department heads and State officials have pointed out to me repeatedly the lack of any understanding of the problem of public improvements in most of the larger counties. Westchester, which has undertaken a great highway, parkway and sewer and water system for the whole county, is an exception.

In most of the larger counties where there are more or less villages and more or less unincorporated territory local authorities seem to have no idea of cooperating on vital problems, involving such matters as water supply and sewage and garbage disposal. There have been recent cases, for example, on Long Island where the Health Commissioner has had to step in under the State Health law to force the local officials to establish proper disposal plants. Delay in laying out trunk sewers is bound to end in a great menace to public health, and ultimately means enormously increased cost in tearing up streets and other improvements to provide these facilities. As long as the village Governments are strong and the town and county Governments are weak and inadequate, we shall not have our counties planned intelligently.

Every student who has ever given this problem any consideration at all agrees that there must be some kind of a proper county executive, whether it be an elected county President or a county manager serving under a small county board. The county Boards of Supervisors in this State in most cases have entirely too many members. Some of them have over fifty. How can a Board of Supervisors of sixty or fifty or even thirty members carry on the executive work of a county? The county supervisors are elected from towns and wards, and none of them represents the county as a whole.

This mixing up of legislative and executive functions has never been successful anywhere. It is agreed that many town functions must be transferred to the county and that a reasonably long term for the executive should be established. It is also agreed that the same changes which are now being made in the State Government looking to the consolidation of departments, appointment of department heads by the county executive, reduction in the number of elective offices and a real county budget system are assential in all of the large and growing counties of the State.

There is a growing conviction that there are too many counties and that there are certain counties which should be consolidated.

It has also been repeatedly recommended that counties should cooperate in the administration of certain joint enterprises, such as tuberculosis hospitals, county jails or farms, &c. Most of the recommendations previously made for the improvement of county government have laid emphasis on immediate economy; that is, savings through internal reorganization or consolidation. I think this is unfortunate. The economies to be obtained in this way are the great ultimate economies, not to be measured in immediate cuts in the budget. They are the economies which result from making plans in advance and from having the right kind of organization to carry them out. They are the savings which result from preventing ultimate waste. I am much more interested in seeing the local government of this State organized to meet the problems of the future than I am to show that through some recommendation of mine there may be a saving of a few hundred dollars in jobs or in purchasing supplies, desirable as these economies may be.

You now have before you the report of the State Reorganization Commission, headed by Governor Hughes. This commission has practically completed its work on the State Government. It included competent and public-spirited people. Its Vice Chairman was the Chairman of the County Government Committee of the Constitutional Convention. This commission would have available to it reports and studies on county, town and village government referred to above, which have been made since the convention of 1915.

I renew my recommendation that you continue this commission for the single purpose of making a study of county and town government, and that in the meantime you adopt a constitutional amendment making the reorganization of county, town and village government possible, to the end that the recommendations of this commission may be promptly put into effect. The amendment proposed in 1915 by the Constitutional Convention would clear the way, and there should be included in this amendment also a provision permitting the consolidation of county governments, with the approval of the counties affected, and a provision giving the city authorities of the City of New York control over the counties within the city. An amendment of this kind will shortly be presented for your consideration.

ALFRED E. SMITH.

## 168. COUNTY HOME RULE

The most common proposal for the reorganization of county government is that for "home rule." The constitutions of a very few states contain provisions permitting such county home rule. Of these the California provisions, adopted in 1911, are the most detailed and comprehensive in their scope, and under them several counties have adopted home rule charters. In New York, the constitution was amended in 1921 to permit reorganization and home rule in the two counties of Westchester and Nassau, these being populous suburban counties on the outskirts of New York City, and thus having special problems of government. Under the terms of this amendment, a county charter for Westchester County was submitted to the voters of that region in 1927, but was defeated by a small majority.

## a. County Home Rule in California

[Constitution of California, Art. XI, Sec. 7½, in *Constitution of the State of California and of the United States and Other Documents* (compiled by Legislative Counsel Bureau of California), pp. 111-119.]

SEC. 7½. Any county may frame a charter for its own government consistent with and subject to the Constitution (or, having framed such a charter, may frame a new one), and relating to matters authorized by provisions of the Constitution, by causing a board of fifteen freeholders, who have been for at least five years qualified electors thereof, to be elected by the qualified electors of said county, at a general or special election. Said board of freeholders may be so elected in pursuance of an ordinance adopted by the vote of three fifths of all the members of the board of supervisors of such county, declaring that the public interest requires the election of such board for the purpose of preparing and proposing a charter for said county, or in pursuance of a petition of qualified electors of said county as hereinafter provided. Such petition, signed by fifteen per centum of the qualified electors of said county, computed upon the total number of votes cast therein for all candidates for Governor at the last preceding general election at which a Governor was elected, praying for the election of a board of fifteen freeholders to prepare and propose a charter for said county, may be filed in the office of the county clerk. . . . If . . . it shall appear that said petition is signed by the requisite number of qualified electors, said clerk shall immediately present said petition to the board of supervisors, if it be in session, otherwise at its next regular meeting after the date of such certificate. Upon the adoption of such ordinance, or the presentation of such petition,



said board of supervisors shall order the holding of a special election for the purpose of electing such board of freeholders, which said special election shall be held not less than twenty days nor more than sixty days after the adoption of the ordinance aforesaid or the presentation of said petition to said board of supervisors; *provided*, that if a general election shall occur in said county not less than twenty days nor more than sixty days after the adoption of the ordinance aforesaid, or such presentation of said petition to said board of supervisors, said board of freeholders may be elected at such general election. Candidates for election as members of said board of freeholders shall be nominated by petition, substantially in the same manner as may be provided by general law for the nomination, by petition of electors, of candidates for county offices, to be voted for at general elections. It shall be the duty of said board of freeholders, within one hundred and twenty days after the result of such election shall have been declared by said board of supervisors, to prepare and propose a charter for said county, which shall be signed in duplicate by the members of said board of freeholders, or a majority of them, and be filed, one copy in the office of the county clerk of said county and the other in the office of the county recorder thereof. . . . Said proposed charter shall be submitted by said board of supervisors to the qualified electors of said county at a special election held not less than thirty days nor more than sixty days after the completion of such publication, or after such posting; *provided*, that if a general election shall occur in said county not less than thirty days nor more than sixty days after the completion of such publication, or after such posting, then such proposed charter may be so submitted at such general election. If a majority of said qualified electors, voting thereon at such general or special election, shall vote in favor of such proposed charter, it shall be deemed to be ratified, and shall be forthwith submitted to the Legislature, if it be in regular session, otherwise at its next regular session, or it may be submitted to the Legislature in extraordinary session, for its approval or rejection as a whole, without power of alteration or amendment. Such approval may be made by concurrent resolution, and if approved by a majority vote of the members elected to each house, such charter shall become the charter of such county and shall become the organic law thereof relative to the matters therein provided, and supersede any existing charter framed under the provisions of this section, and all amendments thereof, and shall supersede all laws inconsistent with such char-

ter relative to the matters provided in such charter. . . . [Here follow detailed provisions with respect to the content of such charter.]

Whenever any county has framed and adopted a charter, and the same shall have been approved by the Legislature, as herein provided, the general laws adopted by the Legislature in pursuance of sections four and five of this article [relating to county government], shall, as to such county, be superseded by said charter as to matters for which, under this section it is competent to make provision in such charter, and for which provision is made therein, except as herein otherwise expressly provided; and except that any such charter shall not affect the tenure of office of the elective officers of the county, or of any district, township or division thereof, in office at the time such charter goes into effect, and such officers shall continue to hold their respective offices until the expiration of the term for which they shall have been elected, unless sooner removed in the manner provided by law.

The charter of any county, adopted under the authority of this section, may be surrendered and annulled with the assent of two thirds of the qualified electors of such county, voting at a special election, held for that purpose, and to be ordered and called by the board of supervisors of the county upon receiving a written petition, signed and certified as hereinabove provided for the purposes of the adoption of charters, requesting said board to submit the question of the surrender and annulment of such charter to the qualified electors of such county, and, in the event of the surrender and annulment of any such charter, such county shall thereafter be governed under general laws in force for the government of counties.

#### b. Proposed Charter for Westchester County

[Summary in *N. Y. Times*, Nov. 6, 1927.]

A County President to be elected at the general election in 1929 and every four years thereafter is proposed in the Westchester County charter, which will be voted on by the qualified electors of that county at the election on Tuesday. The County President will receive a salary of \$15,000 a year and is given broad powers by the charter. The proposed charter also provides for the election of a County Vice President at \$7,500 a year and a County Commissioner of Finance, who is to replace

the County Controller and the County Treasurer, at a salary of \$12,000.

The proposed charter continues the Board of Supervisors as the legislative power of the county. The County Vice President is the presiding officer of the board, which elects a temporary Vice President to act in his absence or disability.

All legislative acts of the board are to be by ordinance which may be disapproved by the County President. The board, however, may pass ordinances vetoed by the County President by a two-thirds vote, unless a greater number of votes was required by law for the original passage of the ordinance. If the County President fails to approve or disapprove an ordinance within ten days after presentation to him, it shall take effect as though he had approved it. The board may provide for the enforcement of ordinances by civil penalty, fine, forfeiture or imprisonment.

No appropriation of money shall be made by the Board of Supervisors for any purpose except by ordinance, specifying each item, the amount thereof, the office or department or the specific purpose for which the appropriation is made. Whenever the Sheriff or District Attorney of the county, pursuant to law, performs duties for the county, the expense of which has not been provided in the county tax budget, such expense may be provided for by the issuance of county obligations payable out of the next tax levy. The provision of this section requiring an appropriation to be made only by ordinance shall not apply to the levy of town or district taxes, pursuant to law, for town or district purposes.

The board, by ordinance passed by two-thirds of all its members, not inconsistent with this chapter or other law, may regulate the exercise of the powers and duties of any county officer, board, commission or department. The board shall have power to investigate all county officers, boards, commissions, and departments and shall have access to all records and papers kept by every officer, board, commission or department, and shall have power to compel the attendance of witnesses and the production of books, papers or other evidence at any meeting of the board or of any committee thereof, and for any such purpose may issue subpoenas signed by the Vice President or temporary Vice President. The Vice President, temporary Vice President or Chairman of a committee may administer an oath to such a witness.

The executive power of the county is to be vested in the County President and in other executive officers or departments provided for by law or by ordinance of the Board of Supervisors.

To be qualified for election as County President, a person must be a citizen of the United States and have been a resident of the county for at least five years. The County President may be removed by the Governor for cause. He must receive a copy of the charges against him and have an opportunity to be heard in his defense.

Eight county departments are proposed by the charter. These are departments of finance, control and purchase, health, public welfare, law, public works, engineering and weights and measures.

The proposed charter abolishes the offices of County Controller and County Treasurer and provides for the election of the County Commissioner of Finance for a four-year term at the same time as the election of the County President. The Commissioner of Finance shall superintend the fiscal affairs of the county and manage the same pursuant to law and ordinance of the Board of Supervisors. He shall keep a separate account with every department, commission, officer or other governmental agency and for every improvement for which funds are appropriated or raised by tax or assessment. No warrant shall be drawn by him for the payment of any claim or obligation against the county unless it states particularly against which of such funds it shall be drawn. No fund shall be overdrawn nor shall any warrant be drawn against one fund to pay a claim chargeable to another.

The Commissioner of Finance shall demand, collect, receive and have the care and custody of and shall disburse all moneys belonging to or due to the county from every source, except as otherwise provided by law.

Provision for the preparation of a tax budget by a Board of Estimate and Apportionment and the Board of Supervisors is made by the proposed charter. The members of the Board of Estimate are to be the County President, County Vice President, Commissioner of Finance, County Attorney and County Engineer. Heads of county departments will be required to submit estimates of expenses by Sept. 15 of each year, and the Board of Estimate must complete its tentative estimate by Oct. 15. After a public hearing, the Board of Estimate must complete its final estimate by Nov. 1, after which the Board of Supervisors will have until Nov. 30 to diminish or reject certain items and adopt the estimate as amended. The amount of estimated expenditures contained in the annual estimate adopted by the Board of Supervisors, together with such additional appropriations as shall have

been made by this board by ordinance, less certain deductions, shall constitute the county tax budget, and the Board of Supervisors shall levy and cause to be raised by tax the amount of such budget in the manner provided by law.

The County President, Vice President, Commissioner of Finance, County Attorney and County Engineer are to constitute the Department of Contract and Purchase. The Department of Health will be headed by a Health Commissioner and Westchester is to be made into a general health district, as defined in the State Public Health law.

The elective office of Commissioner of Public Welfare is to be abolished and a Commissioner of Public Welfare, to be appointed by the County President, will be the head of the Department of Public Welfare.

The County Attorney, the Commissioner of Public Works, the County Engineer and the Commissioner of Weights and Measures will head, respectively, the Departments of Law, Public Works, Engineering and Weights and Measures. All are to be appointed by the County President and to hold office at his pleasure.

### 169. COUNTY MANAGER PLAN

With the city manager form of government generally conceded to be a success in city government, the adaptation of that idea to the county has also been suggested. As a matter of fact, there are a few examples of counties throughout the United States (principally in Southern states), that have governments approximating the manager plan. The occasional provisions for county home rule have resulted in other proposals for genuine county manager government, none of which were until recently adopted by the voters. Finally, North Carolina, in 1926, provided an alternative system of county government, under which several counties of the state have already adopted the county manager plan. The features of this plan are well described in the following selection.

[Paul W. Wager, in *National Municipal Review*, vol. XVI, pp. 519-523 (Aug., 1927).]

North Carolina has one hundred counties and, in the last five years, they have expended two hundred and forty million dollars. These huge expenditures have been made, for the most part, by untrained officers, without unified fiscal control, and without systematic accounting. In other words, county government in North Carolina, as elsewhere, has rapidly grown into a business of gigantic proportions, yet it has tried to operate with the same machinery and the same organization as was set up in colonial days. Indeed some of our county offices and county

government practices originated as far back as the time of William the Conqueror. . . .

The first person to penetrate the jungle of county government in North Carolina was Dr. E. C. Branson of the department of Rural Social Economics of the state university. For ten years he has been directing attention to county government and its antiquated and wasteful practices. He has continued year after year to make investigations, assemble every scrap of evidence that got into print, deliver innumerable addresses, and write unceasingly on the need for improved county government. Then three years ago the university received a grant for research purposes from the Laura Spelman Memorial Fund, thus enabling Mr. Branson at last to undertake a program of research that was both intensive and extensive. Three young men were put into the field and up to the present time comprehensive studies have been made in fifty-one counties.

The second veteran explorer in the field of county government is Dr. E. C. Brooks, formerly state superintendent of public instruction and now president of the state agricultural college. While he was state superintendent he became impressed with the lax financial practices which obtained in the counties and he has not ceased through the intervening years to study county government and to urge reform.

The third man who deserves honorable mention is Governor McLean. He has a passion for efficiency in government and a balanced budget. Upon his election to the governorship he succeeded in securing the adoption of the executive budget as a feature of the state government, and at the close of the first fiscal year the state was able to report a surplus for the first time in its history. As soon as he got the state on a sound financial basis he turned his attention to county government.

In September, 1925, he appointed a commission on county government composed of fourteen men and women who were actively interested in the subject. The commission concluded that the following services well performed will insure good business management. When they are poorly performed there is poor business management and a loss of public service as a result:

- (1) Maintaining unity in the official family of a county in fiscal management;
- (2) Preserving the taxables of a county;
- (3) Collecting the revenue fairly and justly;
- (4) Safeguarding the revenue through proper accounting;

- (5) Safeguarding the expenditures through budget control and a central purchasing agent;
- (6) Protecting the physical property of the county; and
- (7) Providing properly for the administration of justice.

The acts embodying the above recommendations are very simple. If the reader, after reading this introduction, is expecting something radical he will be disappointed. North Carolina is simply attempting to extend to the counties those same principles of government as are being adopted by states and municipalities. They are not revolutionary principles, but their application in county government will indeed be revolutionary.

This act recognizes two forms of county government, the county commissioners form, which is the existing form, and the manager form.

The present form has already been described, and it has been pointed out that with the assistance of a wholetime clerk very good results may be obtained.

The second plan permits the board of county commissioners to appoint a county manager who shall be the administrative head of the county government, and responsible for the administration and all the departments which the board of county commissioners has the authority to control. He shall be appointed with regard to merit only, and he need not be a resident of the county at the time of his appointment. In lieu of the appointment of a county manager, the board may impose and confer upon the chairman of the board the duties and powers of a manager, and under such circumstances he would become a whole-time officer. Or the board may impose and confer the powers and duties of manager upon any other officer or agent of the county who may be sufficiently qualified to perform such duties, adjusting the compensation accordingly.

According to the act, "it shall be the duty of the county manager: (1) to be the administrative head of the county government for the board of commissioners; (2) to see that all the orders, resolutions, and regulations of the board of commissioners are faithfully executed; (3) to attend all the meetings of the board, and recommend such measures for adoption as he may deem expedient; (4) to make reports to the board from time to time upon the affairs of the county, and to keep the board fully advised as to the financial condition of the county and its future financial needs; (5) to appoint, with the approval of the county commissioners, such subordinate officers, agents, and employees for the general administration of county affairs as the board may

consider necessary, except such officers as are required to be elected by popular vote, or whose appointment is otherwise provided by law; (6) to perform such other duties as may be required of him by the board of commissioners."

If the board of county commissioners does not exercise its discretion to appoint or designate a county manager, a petition may be filed with the board, signed by at least 10 per cent of the voters, asking for the adoption of the manager form of county government. Whereupon an election shall be held and, if a majority of the votes cast favor a manager, the board shall proceed to appoint one. Not more than one election may be held within a period of twenty-three months.

Whether the manager form of county government is adopted or the existing form retained, the act makes it the duty of the commissioners to designate some competent person, either a member of the board or some other officer or agent of the county, as purchasing agent. If there is a county manager he would very likely be given that duty. Likewise the board is required to designate some member of the board or some other officer or agent of the county to make a regular inspection of the county property and report the condition of the same to the commissioners.

One county board has already appointed a manager under this act, and there are three counties in which the chairman of the board had been made manager before this act was passed. There are several other counties in which the chairman of the board devotes half or more of his time to county work. Finally, there are fifteen or twenty counties having auditors with duties approximating those of a county manager. Thus it is seen that it is only a step in these counties to the county manager system, and it is reasonable to believe that county managers, in name and in fact, will multiply in the next few years.

## 170. SPECIAL DISTRICTS

In addition to cities, counties, and townships, special districts of various kinds are frequently organized for particular purposes, thus considerably complicating the organization of local government. Usually the special district has independent taxing power up to a certain limit and one motive in creating such districts is likely to be an attempt to evade the tax or debt limits resting on the existing units of local government in the same territory. The following is an example of legislative provision for the creation of special districts.



*AN ACT providing for the organization, operation and dissolution of mosquito abatement districts and providing for the levy, collection and disbursement of taxes therein.*

*Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

SECTION 1. Any contiguous territory having a population of not less than three hundred inhabitants and no part of which is already included in a mosquito abatement district may be organized as a mosquito abatement district. . . .

§ 4. If a majority of the votes cast on the question are in favor of the organization of the territory as a mosquito abatement district such territory shall thenceforth be deemed an organized mosquito abatement district under this Act. The district so organized shall have the name set forth in the petition and by such name may transact all corporate business. Such district shall constitute a body corporate and politic and exercise the powers herein prescribed. All courts of this State shall take judicial notice of the organization of the said mosquito abatement district.

§ 5. Within ten days after the organization of any mosquito abatement district under the provisions of this Act the county judge shall appoint a board of trustees, consisting of five members, for the government and control of the affairs and business of such mosquito abatement district.

§ 6. The trustees appointed in accordance with the foregoing provisions shall constitute a board of trustees for the mosquito abatement district for which they are appointed, and such board of trustees is declared to be the corporate authority of said district and shall exercise all of the powers and control all of the affairs and property of such district. Such board of trustees may provide and adopt a corporate seal. Immediately after their appointment and at their first meeting in December of each year thereafter the board of trustees shall elect one of their number as president, one as secretary, and one as treasurer, and shall elect such other officers as may be necessary. The board of trustees shall provide for the time and place of holding its regular meetings, and may establish rules for its proceedings. Special meetings may be called by the president of the board or by any three trustees, but each member of the board shall be given notice of such special meeting at least three hours prior thereto. All of the meetings of such board, whether regular or special, shall be open to the public. A majority of the board of trustees shall constitute a quorum but a smaller number may

adjourn from day to day. Said board shall keep a regular book of records of all of the proceedings of said board, which book shall be open to the inspection of any person residing in said district at all reasonable and proper times.

§ 7. The board of trustees of such district shall have power to take all necessary or proper steps for the extermination of mosquitoes, flies or other insects within the district, and, subject to the paramount control of the municipal or other public authorities, to abate as nuisances all stagnant pools of water and other breeding places for mosquitoes, flies or other insects within the district; to purchase such supplies and materials and to employ such labor and assistants as may be necessary or proper in furtherance of the objects of this Act, and if necessary or proper, in the furtherance of the same, to build, construct and thereafter to repair and maintain necessary levees, cuts, canals or channels upon any land within the district, and to acquire by purchase, condemnation or other lawful means, in the name of the district, any necessary lands, rights of way, easements, property or material requisite or necessary for any such purpose; to make contracts to indemnify or compensate any owner of land or other property for any injury or damage necessarily caused by the exercise of the powers of this Act conferred or arising out of the use, taking or damage of such property for any such purposes, and generally to do any and all things necessary or incident to the powers hereby granted and to carry out the objects specified herein.

§ 8. The board of trustees of any mosquito abatement district shall, in its work, advise and cooperate with the Department of Public Health of the State, and the board of trustees of such district shall submit to such department, on or before January 1st of each year, a report of the work done and results obtained by the district during the preceding year.

§ 9. Any mosquito abatement district organized under the provisions of this Act may levy and collect a general tax on the property situated in such district, but the aggregate amount of taxes levied for any one year shall not exceed the rate of one-half of one mill on each dollar of taxable property in said district on the aggregate valuation as equalized for State and county taxes for the preceding year. The board of trustees shall determine and certify the amount to be levied and shall return the same to the county clerk. The county clerk in reducing the tax levies under the provisions of section 2 of "An Act concerning the levy and extension of taxes," approved May 9, 1901, as amended, shall

not include the said tax authorized by this Act in the limitation of one per cent of the assessed valuation upon which taxes are required to be extended. . . .

§ 12. The invalidity of any part or portion of this Act shall not affect the validity of the remaining part thereof.

APPROVED July 7, 1927.

## 171. LOCAL GOVERNMENT IN COOK COUNTY

On account of the creation of numerous special districts, Cook County, Illinois, has one of the most complicated systems of local government to be found anywhere in the world. Under such conditions, inefficiency and conflicts of authority are likely and popular control is difficult, if not impossible. Unification is a crying need. A remedy might be found in city and county consolidation, which has already made some progress in this country.

[*Consolidation of Local Governments in Chicago*, pamphlet prepared by Chicago Bureau of Public Efficiency, 1920, pp. 7-9.]

There are 24 separate local governmental agencies within the City of Chicago, each independently expending taxes and other public moneys. They are:

- Cook County
- Forest Preserve District
- Sanitary District of Chicago
- City of Chicago
- Board of Education
- Library Board
- Municipal Tuberculosis Sanitarium
- South Park Commissioners
- West Chicago Park Commissioners
- Lincoln Park Commissioners
- Ridge Avenue Park Commissioners
- North Shore Park Commissioners
- Calumet Park Commissioners
- Fernwood Park Commissioners
- Ridge Park Commissioners
- Irving Park Commissioners
- Northwest Park Commissioners
- Old Portage Park Commissioners
- Edison Park Commissioners
- West Pullman Park Commissioners (partly outside Chicago)
- Ravenswood Manor-Gardens Park Commissioners
- River Park Commissioners

Commissioners of the First Park District of the  
City of Evanston (partly within Chicago)  
Albany Park Commissioners

This number does not include the 14 townships, of which there are eight lying wholly within the City and six partly within and partly without. The towns lying wholly within the City are practically defunct, although they still have a nominal legal existence. The towns lying partly within its limits perform no functions in the City, but the citizens of Chicago who reside in such towns vote for town officers and pay town taxes which are expended entirely outside the City, and for which they receive no benefits.

Not only are there many local governments within the City of Chicago, but the number of elective officials is excessively large, and elections are of frequent occurrence. Seldom are there less than two elections in any year and often there are three. The high cost of elections is one of the burdens which has become intolerable and from which taxpayers should be given relief.

The number of public officials (national, state, and local) for which each [male] elector in Chicago is expected to vote is 151. The number of national officials is 7; state, 23; county, 73; sanitary district, 10; city, 38.

Not all these officials are voted for at one time, but the number chosen at some elections is in excess of 50. If the municipal court judges are excepted, there are but few elective city officials. It is the County government that adds most to the length of the ballot and unfortunately the number of elective county officials cannot be materially reduced until the present constitution of Illinois, which requires the election of nearly all of them, is changed.

The many overlapping local governments, numerous elections, and the large number of elective officials in Chicago result in an enormous waste of public funds and prevent the community from securing the full measure of service and efficiency to which it is entitled.

Chicago governments should be consolidated into a single municipality and the number of elections and of elective officials should be reduced. The need for these changes has long been recognized, but the increasing cost of government in recent years and mounting taxes serve to emphasize the necessity for action and to make it imperative that steps be taken to afford relief. In January, 1917, the Chicago Bureau of Public Efficiency, in a report on unification, estimated that the consolidation and re-

organization of these local governments would save Chicago more than \$3,000,000 a year. With the advance in costs, which has since occurred, a much greater saving would now be possible. The gain in a larger and more efficient service would be of even greater value to the community than the direct money saving, important as that is.

The movement for city and county consolidation is country-wide. San Francisco, St. Louis, Denver, Baltimore and other cities have demonstrated by experience that unified government for a large community is better than independent city and county governments. Other important cities in the United States are moving quite generally to bring about city and county consolidation. In Great Britain, also, large cities carry on the county functions within their limits. The situation in this respect is similar in Germany.

## CHAPTER XXVIII

### MUNICIPAL GOVERNMENT

#### 172. MUNICIPAL HOME RULE

Although cities are largely subject to the control of the state legislatures in respect to their organization and powers, the demand for local autonomy in these matters has been met to some extent by the device of constitutional home rule. Beginning with Missouri in 1875, more than a dozen states have granted home rule to cities by constitutional provision. These provisions generally confer upon cities the power to frame their charters, subject to certain requirements and limitations. The procedure in framing charters together with the limitations resting thereon are outlined in the first of the following selections. The other selections give the text of the home rule constitutional provisions in the typical states of Missouri, Ohio, and New York.

##### a. Analysis of Home Rule Provisions

[*Illinois Constitutional Convention Bulletins, 1920, pp. 409-410, 414-415.*]

**Charter-making Procedure:** In most of the constitutional provisions for municipal home rule, the main emphasis has been laid on the authority to frame and adopt charters. In most cases the procedure for charter-making is prescribed in the constitution; but this is not done in Oregon, Michigan and Texas; and in Michigan and Texas the constitutional provisions have been supplemented by legislation regulating the procedure and methods to be followed.

It is urged in support of detailed constitutional provisions on procedure, that unless these are definitely set forth in the constitution the grant of municipal home rule is merely formal and directory, and remains subject to legislative control in the enabling act. On the other hand it may be said that the grant of substantive powers is of more importance than the details of procedure; that the variations in the procedural provisions in the various constitutions and their frequent amendment indicate the absence of agreement as to the best system of procedure; that none of the constitutional provisions is entirely self-executing; and that in the states where the procedure is regulated by statute workable provisions have been adopted and there has been no

serious complaint that the legislature has abused its power, while changes in detail may be more readily made.

In ten of the thirteen home rule states (all except Minnesota, Oregon and Colorado) the local councils may initiate charter-making proceedings; in eleven states (all except Missouri and Washington), the initiative may be begun by popular petition; and in eight states (all but the five named above) either method may be used.

All of the home rule states except Oregon provide for a special body to draft the charter, styled a board of freeholders or charter commission. These bodies consist of from 11 to 21 members, elected at large, except in Oklahoma and Michigan (where members are elected by wards) and in Minnesota where they are appointed by the district judges. In Oregon proposed charters or amendments are presented by initiative petition or by the local council. In Maryland county charter boards have only five members.

In seven states, only freeholders may be members of the charter boards. In several states there are special residence requirements. In some states any qualified voter may be chosen. Most states provide no compensation for the charter board; but compensation is authorized in Colorado and Michigan.

Most states fix a time limit for the preparation of the charter, ranging from 30 days in Washington to one year in Ohio. From 90 days to six months are the more common periods.

In all the home rule states proposed charters and amendments must be submitted to popular ratification. In six states provision is made for publication in local newspapers; in California charters must also be printed in pamphlet form for distribution on application; and in Ohio, Oregon and Texas a copy of proposed charters must be sent to every voter before the election. It is usually provided that the ratification election must come within certain time limits after publication—generally from 20 to 90 days.

A majority of those voting on the charter is in most cases sufficient for ratification. In Texas, however, there must be a majority of the total vote at the election. Missouri and Minnesota require three-fifths or four-sevenths, respectively, of those voting at the election, a provision which has increased the difficulty of adopting charters.

In several states provision is made for submitting charters to state authorities before they go into effect. In California, all charters are transmitted to the legislature for approval or rejection.

tion as a whole. In Arizona and Oklahoma, charters are submitted to the Governor, who shall approve them unless in conflict with the constitution or [and] laws of the state. In Michigan the legislative act provides that proposed charters before ratification shall be submitted to the Governor, and if he disapproves a two-thirds vote of the charter commission is required. Thus far no charters have been disapproved in these states.

Most states provide that official copies of charters and amendments shall be filed with the Secretary of State; and in several states it is specifically provided that the courts shall take judicial notice of such charters.

Amendments to former legislative charters may be adopted under the home rule procedure in Oregon, Michigan and Texas, without first adopting a new charter by this method. In the other home rule states, amendments may be made only to home rule charters. The procedure for amendments is similar to that of framing a new charter, except that a special charter board need not be organized. In most cases amendments may be prepared either by the local council or by popular petition. In Missouri and Washington amendments may be proposed only by the council; and in Colorado only by petition. The proceedings for the submission and ratification of amendments is the same as for new charters.

**Requirements and Limitations:** Most of the home rule provisions of state constitutions include, along with the power to adopt charters, certain mandatory provisions, and some negative restrictions and limitations. In Missouri the charter must provide for a mayor and for a bicameral council, one branch of which shall be elected at large. In Minnesota, the charter must provide for a mayor and a council of one or two branches, and if bicameral at least one branch must be elected at large. The Colorado amendment requires the City and County of Denver to designate officers who shall perform the duties of county officers, and to provide that the departments of fire and police and of public utilities and works shall be under civil service regulations.

The Michigan Constitution prohibits cities and villages from abridging the elective franchise, loaning their credit, or imposing taxes for other than public purposes; it requires a three-fifths vote for acquiring public utilities or granting irrevocable public utility franchises; and it requires the legislature to limit their powers of taxation and debt. The legislature has further required that the charter provide for a mayor, a legislative body,



a clerk and treasurer, and establish regulations for the conduct of elections and a system of accounts.

In the Ohio provisions, laws are authorized to limit the power of cities to levy taxes and incur debts, and to require financial reports and the examination of municipal accounts.

The long and detailed provisions in the California constitution, while in form adding to the grant of powers, inevitably tend to limit the freedom of local action, as is also indicated by the frequency of their amendment.

Some limitations on municipal powers are necessary, and are recognized by most advocates of the home rule charter system. Such provisions as those in the Michigan and Ohio constitutions continuing legislative control over taxation, debt, financial reports and accounts, and the police power of the state, are not in conflict with the general principle of home rule in local affairs.

But if the grant of municipal home rule is to be effective, the detailed provisions of some of the constitutional provisions indicate the danger of too minute regulation in the constitution, which may have the effect of substituting a more drastic and rigid constitutional control for a more flexible system of legislative control. Requirements as to specific officials, specific financial limitations, and even detailed regulations as to charter procedure are matters outside the field of constitutional principles. Such provisions are necessarily subject to change, and are likely to hamper future development, even if the practice of some states of adopting numerous amendments to the constitution at every election is introduced.

#### b. Home Rule in Missouri

[Constitution of Missouri, Art. IX, secs. 16-17; in *Kettleborough, State Constitutions*, pp. 798-799.]

SEC. 16. Any city having a population of more than one hundred thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this State, by causing a board of thirteen freeholders, who shall have been for at least five years qualified voters thereof, to be elected by the qualified voters of such city at any general or special election; which board shall, within ninety days after such election, return to the chief magistrate of such city a draft of such charter, signed by the members of such board or a majority of them. Within thirty days thereafter, such proposed charter shall be submitted to the qualified voters of such city, at

a general or special election, and if four-sevenths of such qualified voters voting thereat shall ratify the same, it shall, at the end of thirty days thereafter, become the charter of such city, and supersede any existing charter and amendments thereof. A duplicate certificate shall be made, setting forth the charter proposed and its ratification, which shall be signed by the chief magistrate of such city and authenticated by its corporate seal. One of such certificates shall be deposited in the office of the Secretary of State, and the other, after being recorded in the office of the recorder of deeds for the county in which such city lies, shall be deposited among the archives of such city, and all courts shall take judicial notice thereof. Such charter, so adopted, may be amended by a proposal therefor, made by the lawmaking authorities of such city, published for at least thirty days in three newspapers of largest circulation in such city, one of which shall be a newspaper printed in the German language, and accepted by three-fifths of the qualified voters of such city, voting at a general or special election, and not otherwise; but such charter shall always be in harmony with and subject to the Constitution and laws of the State.

SEC. 17. It shall be a feature of all such charters that they shall provide, among other things, for a mayor or chief magistrate, and two houses of legislation, one of which at least shall be elected by general ticket; and in submitting any such charter or amendment thereto to the qualified voters of such city, any alternative section or article may be presented for the choice of the voters, and may be voted on separately, and accepted or rejected separately, without prejudice to other articles or sections of the charter or any amendment thereto.

### c. Home Rule in Ohio

[Constitution of Ohio, Art. XVIII, secs. 1-3, 7-9, 14; in Kettleborough, *State Constitutions*, pp. 1085-1086.]

SECTION 1. Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.

SEC. 2. General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become op-

erative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

SEC. 3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

SEC. 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

SEC. 8. The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, "Shall a commission be chosen to frame a charter." The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of such municipality at the time fixed therein.

SEC. 9. Amendments to any charter framed and adopted as herein provided may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof,

and, upon petitions signed by ten per centum of the electors of the municipality setting forth any such proposed amendment, shall be submitted by such legislative authority. The submission of proposed amendments to the electors shall be governed by the requirements of section 8 as to the submission of the question of choosing a charter commission; and copies of proposed amendments shall be mailed to the electors as hereinbefore provided for copies of a proposed charter. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality. A copy of said charter or any amendment thereto shall be certified to the secretary of state, within thirty days after adoption by a referendum vote.

. . . . .

SEC. 14. All elections and submissions of questions provided for in this article shall be conducted by the election authorities prescribed by general law. The percentage of electors required to sign any petition provided for herein shall be based upon the total vote cast at the last preceding general municipal election.

#### d. New York Home Rule Amendment of 1923

[Constitution of New York, Art. XII, secs. 2-5; in *New York Legislative Manual*, 1927, pp. 163-164.]

SEC. 2. The Legislature shall not pass any law relating to the property, affairs or government of cities, which shall be special or local either in its terms or in its effect, but shall act in relation to the property, affairs or government of any city only by general laws which shall in terms and in effect apply alike to all cities except on message from the governor declaring that an emergency exists and the concurrent action of two-thirds of the members of each house of the Legislature.

SEC. 3. Every city shall have power to adopt and amend local laws not inconsistent with the constitution and laws of the State, relating to the powers, duties, qualifications, number, mode of selection and removal, terms of office and compensation of all officers and employees of the city, the transaction of its business, the incurring of its obligations, the presentation, ascertainment and discharge of claims against it, the acquisition, care, management and use of its streets and property, the wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or sub-

contractor performing work, labor or services for it, and the government and regulation of the conduct of its inhabitants and the protection of their property, safety and health. The Legislature shall, at its next session after this section shall become part of the constitution, provide by general law for carrying into effect the provisions of this section.

SEC. 4. The provisions of this article shall not be deemed to restrict the power of the Legislature to enact laws relating to matters other than the property, affairs or government of cities.

SEC. 5. The Legislature may by general laws confer on cities such further powers of local legislation and administration as it may, from time to time, deem expedient.

### 173. THE POSITION OF THE MAYOR

In spite of the development of the commission and manager forms of city government, the mayor is still the most prominent and important executive officer in American cities. Some of the powers of the mayor of New York City are indicated by the extracts from the charter of that city given in the first of the following selections. In the second selection the development of the office of mayor in recent decades is traced.

#### a. The Mayor's Powers in New York City

[The New York City Charter of 1901 (as amended), secs. 94, 95, 115, 118, 122; text in Reed and Webbink, *Documents on Municipal Government* (Century Company), pp. 158-162.]

SECTION 94. The executive power of The City of New York, as constituted by this act, shall be vested in the mayor, the presidents of the several boroughs and the officers of the several departments. The mayor shall be the chief executive officer of the city; he shall be elected at the general election in the year nineteen hundred and five, and every four years thereafter, and shall hold his office for the term of four years commencing on the first day of January after his election. The salary of the mayor shall be fifteen thousand dollars a year.

SEC. 95. The mayor may whenever in his judgment the public interests shall so require, remove from office any public officer holding office by appointment from a mayor of The City of New York, except members of the board of education, and aqueduct commissioners, trustees of the College of The City of New York, and trustees of Bellevue and allied hospitals, and except also judicial officers for whose removal other provision is made by the constitution. No public officer shall hold his office for any

specific term, except as in this act is otherwise expressly provided.

SEC. 115. It shall be the duty of the mayor:

1. To communicate to the board of aldermen, at least once in each year, a general statement of the finances, government and improvements of the city.

2. To recommend to the board of aldermen all such measures as he shall deem expedient.

3. To keep himself informed of the doings of the several departments.

4. To be vigilant and active in causing the ordinances of the city, and laws of the state to be executed and enforced, and for that purpose he may call together for consultation and co-operation any or all of the heads of departments.

5. And generally to perform all such duties as may be prescribed for him by this act, the city ordinances and the laws of the state.

SEC. 118. The mayor shall appoint the heads of departments and all commissioners, except as otherwise provided in this act. He shall also appoint all members of any board or commission authorized to superintend the erection or repair of any building belonging to or to be paid for by the city, whether named in any law or appointed by any local authority, and also a commissioner of jurors for the boroughs of Manhattan and the Bronx, inspectors of weights and measures as may by ordinance be prescribed, and also the members of any other local board and all other officers not elected by the people, whose appointment is not excepted or otherwise provided for. Every head of department and person in this section named, shall, subject to the power of removal herein provided, hold his office for such term as is provided by this act, or otherwise, and in each case until a person is duly appointed, and has qualified, in his place.

SEC. 122. The mayor may be removed from office by the governor in the same manner as sheriffs, except that the governor may direct the inquiry provided by law to be conducted by the attorney-general; and after the charges have been received by the governor, he may, pending the investigation, suspend the mayor for a period not exceeding thirty days.

### b. The Historical Development of the Mayoralty

[R. M. Story, *The American Municipal Executive* (University of Illinois Studies in the Social Sciences, 1918, vol. VII, no. 3), pp. 34-36.]

By the close of the century the federal principles of government as conceived and worked out in the American national government had wrought an almost complete change in the organization of American cities. Some things yet remained to be done if a true copy of the federal system was to be realized in municipal government, but, barring a revolutionary upheaval in thinking and in tendencies, the complete application and acceptance of these principles did not appear to be far distant. Moreover, most men were hoping that this time might come speedily. Only here and there arose rare and scattered voices of protest and pleas for the revival and restoration of council government. The tide toward mayor government and the exaltation of the executive seemed to be sweeping ahead irresistibly. The mayoralty seemed destined to become the center of that centralization in our municipal democracies toward which De Tocqueville asserted all democratic governments were tending.

How altered is the situation today! At the very moment of its triumph the mayor plan was successfully challenged. Now nearly a half thousand vigorous and aggressive municipalities enthusiastically proclaim that they have found something better, and in these the mayor is either largely shorn of his power, or dispensed with altogether. Every year adds some scores to the number of cities which relegate to the past the federal analogy as developed in the field of municipal government. To take its place the commission plan and the city manager plan have appeared. They have not won recognition without a struggle, but they have won it. The old order is changing rapidly.

Nevertheless the mayor plan will not disappear. In the course of the contest for public favor it is being stimulated and purified. Many of the more important achievements of the past fifteen years stand to the credit of cities governed under a mayoral regime. In these accomplishments the leadership of the mayors has been conspicuous. Education in local problems has very often been the product of a mayor's leadership and vision. The organization of mayors' associations in many states testifies to a desire and determination to furnish constituencies with intelligent political leadership. The most active members of state and national organizations for municipal betterment are frequently mayors of cities. The mayoralty has undoubtedly held its own in the great cities of the country, and the total number of cities under mayor government is probably not very many less than it was at the beginning of the century. Moreover, it must not be forgotten that there has been a continued development of

the power and position of the mayor, and that its predominance in the system based upon the federal analogy is more firmly established than ever before. The desire to supplement popular control and clearly defined responsibility with efficiency has caused the further strengthening of the executive, and the success of rival schemes of municipal organization has hastened and accentuated this development.

Despite this apparent position and continued growth of the mayoralty, it must be observed that it is no longer the most striking feature of municipal life and organization. Though by no means inconspicuous, recent surveys of municipal tendencies have often omitted to mention it, an oversight which would have been inconceivable little more than a decade ago. It is more difficult to watch a three-ringed performance and the tendency is to watch most intently the latest development. It is true, too, that having set up an organ of government that was both powerful and responsible the attention of reformers was turned toward other problems of municipal life and government, especially that of securing efficiency in the public service. To the solution of this problem both the commission and the city manager plans have rendered signal help. These plans have been the offspring of the movement for efficiency. The evolution of mayor government gradually prepared the electorate for that concentration of authority which efficient administration demands. The splendid successes of the newer forms of government have not sprung full-grown from the fertile womb of disaster; they are rather the product of earlier struggles, the end of which was the reconciliation of democracy and efficiency in American city government. It now appears that mayor government, commission government, and city manager government are to participate in achieving that end. For today each of these forms is potentially and actively full of promise that the end will be realized. The municipal citizen who is still in the prime of life has a reasonable expectancy of living to see good government become the normal thing in American cities, whether their executives are mayors, mayor-commissioners, or city managers.

#### 174. SPECIAL LEGISLATION FOR CHICAGO

Until 1904 the legislature of Illinois was prohibited by the state constitution from passing special legislation for particular cities. This worked a hardship in the case of Chicago because conditions there differed so much from those in the other cities of the state that general laws could not well be adapted to Chicago. Consequently, in that year an amendment to the



constitution was adopted allowing special legislation for Chicago subject to the popular referendum.

[Constitution of Illinois, Art. IV, sec. 34; in *Illinois Blue Book*, 1927-28, pp. 66-67.]

SEC. 34. The General Assembly shall have power, subject to the conditions and limitations hereinafter contained, to pass any law (local, special or general) providing a scheme or charter of local municipal government for the territory now or hereafter embraced within the limits of the City of Chicago. The law or laws so passed may provide for consolidating (in whole or in part) in the municipal government of the City of Chicago, the powers now vested in the city, board of education, township, park and other local governments and authorities having jurisdiction confined to or within said territory, or any part thereof, and for the assumption by the City of Chicago of the debts and liabilities (in whole or in part) of the governments or corporate authorities whose functions within its territory shall be vested in said City of Chicago, and may authorize said city, in the event of its becoming liable for the indebtedness of two or more of the existing municipal corporations lying wholly within said City of Chicago to become indebted to an amount (including its existing indebtedness and the indebtedness of all municipal corporations lying wholly within the limits of said city, and said city's proportionate share of the indebtedness of said county and sanitary district, which share shall be determined in such manner as the General Assembly shall prescribe) in the aggregate not exceeding 5 per centum of the full value of the taxable property within its limits, as ascertained by the last assessment, either for State or municipal purposes previous to the incurring of such indebtedness (but no new bonded indebtedness, other than for refunding purposes, shall be incurred until the proposition therefor shall be consented to by a majority of the legal voters of said city voting on the question at any election, general, municipal or special); and may provide for the assessment of property and the levy and collection of taxes within said city for corporate purposes in accordance with the principles of equality and uniformity prescribed by this Constitution; and may abolish all offices, the functions of which shall be otherwise provided for; and may provide for the annexation of territory to or disconnection of territory from said City of Chicago by the consent of a majority of the legal voters (voting on the question at any election, general, municipal or special) of the said City and of a majority of the voters of

such territory voting on the question at any election, general, municipal or special; and in case the General Assembly shall create municipal courts in the City of Chicago it may abolish the offices of justices of the peace, police magistrates and constables in and for the territory within said city, and may limit the jurisdiction of justices of the peace in the territory of said County of Cook outside of said city to that territory, and in such case the jurisdiction and practice of said municipal courts shall be such as the General Assembly shall prescribe; and the General Assembly may pass all laws which it may deem requisite to effectually provide a complete system of local municipal government in and for the City of Chicago.

No law based upon this amendment to the Constitution, affecting the municipal government of the City of Chicago, shall take effect until such law shall be consented to by a majority of the legal voters of said city voting on the question at any election, general, municipal or special; and no local or special law based upon this amendment affecting specially any part of the City of Chicago shall take effect until consented to by a majority of the legal voters of such part of said city voting on the question at any election, general, municipal or special. Nothing in this section contained shall be construed to repeal, amend or affect section four (4) of Article XI of the Constitution of this State.

## 175. CITY MANAGER CHARTER OF CLEVELAND

Although the city manager plan of government has spread widely, it has been confined in the main to comparatively small cities. The adoption of the plan by a city as large as Cleveland, Ohio, is therefore a noteworthy event. The following selection gives the pertinent sections of the city charter dealing with the city manager and the administrative organization.

[Charter of the City of Cleveland, 1923, secs. 32-42; text in Reed and Webbink, *Documents on Municipal Government* (Century Company), pp. 406-409.]

**SECTION 32.** The Council shall appoint a City Manager who shall be the chief executive officer of the city. He shall be chosen solely on the basis of his executive and administrative qualifications and need not when appointed be a resident of the city or state. No member of the Council shall be chosen as City Manager. The City Manager shall not be appointed for a definite term but shall be removable at the pleasure of the Council. If removed at any time after he has served six months he may de-

mand written charges and the right to be heard thereon at a public meeting of the Council prior to the date on which his final removal shall take effect, but pending and during such hearing the Council may suspend him from office. The action of the Council in suspending or removing the City Manager shall be final, it being the intention of this Charter to vest all authority and fix all responsibility for any such suspension or removal in the Council. In case of the absence or disability of the Manager the Council may designate some qualified person to perform the duties of the office. The Manager shall receive such compensation as may be fixed by the Council.

SECTION 33. The City Manager shall be responsible to the Council for the proper administration of all affairs of the city placed in his charge and to that end shall appoint all directors of departments. He shall also appoint all officers and members of commissions not included within regular departments, except as otherwise provided in this Charter. Appointments made by the City Manager shall be on the basis of executive and administrative ability and of the training and experience of such appointees in the work which they are to administer. All such officers shall be immediately responsible to the City Manager and may be removed by him at any time. In case of removal, if the officer removed so demand, a written statement shall be made to him by the City Manager of the reasons therefor and he shall be given a public hearing by the City Manager before the order of removal is made final. The statement of the City Manager and any written reply of the officer thereto shall be filed as a public record in the office of the City Clerk.

SECTION 34. Neither the Council nor any of its committees or members shall dictate or attempt to dictate the appointment of any person to, or his removal from, office or employment by the City Manager or any of his subordinates, or in any manner interfere in the appointment of officers and employes in the administrative service. Except for the purpose of inquiry, the Council and its members shall deal with the part of the administrative service for which the City Manager is responsible solely through such Manager, and neither the Council nor any members thereof shall give orders to any of the subordinates of the City Manager either publicly or privately.

SECTION 35. It shall be the duty of the City Manager to act as chief conservator of the peace within the city; to supervise the administration of the affairs of the city; to see that the ordinances of the city and the laws of the state are enforced; to

make such recommendations to the Council concerning the affairs of the city as may seem to him desirable; to keep the Council advised of the financial condition and future needs of the city; to prepare and submit to the Council the annual budget estimate; to prepare and submit to the Council such reports as may be required by that body; and to perform such other duties as may be prescribed by this charter or be required of him by ordinance or resolution of the Council.

SECTION 36. The City Manager, the directors of all departments, and such other officers of the city as may be designated by the vote of the Council, shall be entitled to seats in the Council. Neither the City Manager nor any such director or officer shall have a vote in the Council, but the City Manager shall have the right to take part in the discussion of all matters coming before the Council, and the directors and other officers shall be entitled to take part in all discussions of the Council relating to their respective departments and offices.

SECTION 37. There shall be a Department of Law, a Department of Finance, a Department of Public Utilities, and such other departments and offices as may be established by ordinance. The Council may discontinue any department or office established by ordinance, and may prescribe, combine, distribute or abolish the functions and duties of departments and offices; but no function or duty assigned by this Charter to a particular department or office shall be abolished or assigned to any other department or office. No administrative department or office shall be established or discontinued until the recommendations of the City Manager thereon shall have been heard by the Council. Departments and offices existing at the time of the adoption of this section, and not specifically mentioned therein, shall continue as though established thereby but subject to alteration or discontinuance by ordinance.

SECTION 38. The Council, the City Manager, or any person or committee authorized by either of them, shall have power to inquire into the conduct of any department or office of the city and to make investigation as to city affairs, and for that purpose may subpoena witnesses, administer oaths, and compel the production of books, papers and other evidence. It shall be the duty of the City Manager to designate a police officer to serve such subpoenas. The Council shall provide by ordinance the penalty or penalties for contempt in refusing to obey any such subpoena, or to produce such books, papers and other evidence,

and shall have the power to punish any such contempt in the manner provided by ordinance.

SECTION 39. At the head of each department there shall be a director who shall have supervision and control of the department. He shall have power to prescribe rules and regulations, not inconsistent with this Charter, for the conduct of the officers and employes of his department; for the distribution and performance of its business; and for the custody and preservation of the books, records, papers and property under its control.

SECTION 40. The work of the several departments shall be distributed among such divisions thereof as are established by this Charter and as may be established by the Council by ordinance. There shall be a commissioner, or chief, in charge of each division who shall be appointed, and may be removed, by the director of the department in conformity with the civil service provisions of this Charter. Each commissioner shall, with the approval of the director of his department, appoint all officers and employes of his division and have supervision and control of its affairs.

SECTION 41. The director of a department, with the approval of the City Manager, may appoint a board composed of citizens qualified to act in an advisory capacity to the commissioner of any division under his supervision. The members of any such board shall serve without compensation and their duty shall be to consult and advise with the commissioner, but not to direct the conduct of the division. Any recommendation of such board shall be in writing and become a part of the record of the department. Stated public meetings of such boards shall be called by the commissioner for the consideration of the affairs of the division. The commissioner of the division shall be chairman of such meetings.

SECTION 42. The director of each department and the head of each office, shall annually, on such date as may be fixed by the Council, render to the City Manager a full report of the transactions of his department or office for the year, and shall furnish the Council or the City Manager at any time such information relating to his department or office as either may require.

## 176. METROPOLITAN AREAS

There are many cities in the United States that have outgrown their boundaries. They have become the nucleus of a cluster of surrounding communities all of which taken together constitute a metropolitan area. In many respects these communities are a unit, but for reasons of local

pride annexation by the central city is frequently opposed. In order to meet this situation, the creation of a new governmental unit, to be known as the region, has been suggested. This proposal is thoughtfully discussed in the following selection.

[Thomas H. Reed, "The Region, a New Governmental Unit; The Problem of Metropolitan Areas," *National Municipal Review*, vol. XIV, pp. 417-423 (July, 1925).]

Plans must not only be made but executed. Great as are the difficulties in the way of carrying out a plan which affects but one city, they are as nothing to those which dog the path of the regional plan of a metropolis. It is proper, therefore, that we should consider not only the matter of organization for metropolitan plan making but of the organization of the metropolis for plan execution. Consistent and comprehensive results cannot ordinarily be expected from the mere voluntary co-operation of the authorities concerned. It is easy enough to understand why the directors of the "Plan of New York and Its Environs" pin their faith to voluntary co-operation. They have nothing else to pin to. The proposal to unite in any formal way the parts of three states which fall within the metropolitan area of New York would arouse suspicions and antagonisms enough to lose the battle before it is begun. Under such circumstances it is clearly the part of wisdom to preach voluntary co-operation. Given an intelligently directed and adequately supported planning agency to stimulate the multitude of diverse authorities to action, great things may be thus accomplished. In general, however, to rely on voluntary co-operation is to surrender all hope of substantial success.

The objects of metropolitan organization are: first, to secure the execution of a uniform policy or plan with regard to that group of services properly supplied by local rather than by state or national enterprise and yet of interest to the whole metropolis; and second, to achieve an equitable adjustment of financial burdens between the various portions of the metropolitan community. A metropolis, however, is not an assemblage of individuals so much as a collection of communities in which individuals are already assembled. To these communities attach a complex of pride, prejudice and affection which give rise to what our Belgian friends call "esprit de clocher." Political scientists have long realized the error of ignoring the people's natural emotional responses, however irrational they may appear. No opportunity should be neglected for employing the sentiment of local patriotism in the service of local government. Metropolitan or-

ganization, therefore, must not fly in the face of the traditions and habits of the people, but must leave in existence, to the greatest extent possible, the customary units of local government.

A variety of attempts have been made to solve the metropolitan problem. None of them have satisfactorily solved it. We must seek a new method. To begin with, dependence cannot be placed on the enlargement of city boundaries to cover the metropolitan area. The process of annexation has always lagged far behind the spread of population. Take Brussels as an extreme example, with 215,145 people in the city of Brussels and 593,188 in the fourteen neighboring communes. Take Boston, with 748,060 inside the city, and 1,054,260 in a ten-mile zone outside. Paris made her last annexations in 1860, and approximately a third of the population of metropolitan Paris now dwell in the *banlieue*. The present boundaries of the administrative county of London were fixed in 1855 and 3,000,000 people now dwell in the outer ring. Large-scale attempts to solve the metropolitan problem have usually been accompanied by recognition of the identity of existing units—some of them by genuine municipal federalism. The proposition of further municipal expansion, however, even so qualified arouses increasing opposition.

Cities grow after the manner of the forest. Around the parent tree a grove springs up, but seed are also borne afield, and some falling in favored spots sprout into new groves which grow with the first until all are merged in one spreading forest. When outlying centers of population have long enjoyed an individual life that strange spirit, civic pride, breathes through them. They cling determinedly to their individuality, and almost always resist annexation under any guise. The longer they have stood alone, the stouter their resistance. . . .

A growing conviction exists that there is a limit to successful bigness. Once a size has been attained, at half a million, or a million, where the substantial economies of large-scale purchasing and organization have been reached, further bigness only hampers administration. A great city loses in the increasing impersonality of all its efforts more than it gains by the large scale of its operations. As a means of enlisting popular interest in government, great size is equally a failure. In the swollen metropolis the individual is lost and knows it. There was a time when men could be induced to give up local independence and vote for annexation to a big city so that they might say, "I am a New Yorker." To-day they seem to prefer to say, "I am a



citizen of Bronxville." The growing army of suburbanites have forsaken the great city because they deliberately prefer the life of the smaller community. They can scarcely be expected to welcome reabsorption into the mass they have tried to escape. The day when the metropolitan problem could be solved by annexation is past.

It is easy in the perplexities of the metropolitan problem to turn to the supreme authority of the state for relief. In the centralized states of Europe, and, to a less extent in England, there is no doubt that some of the conflicts of interest characteristic of metropolitan conditions are smoothed away by the interposition of some department of the central government. I have no disposition to question the beneficent results of thus stimulating the co-operation of neighboring communities. It may prove especially effective where the machinery of common action, like the joint committees of the English planning act or the *syndicats* of communes provided by the French Code Municipal are at hand. There is, however, no administrative tutelage of local government in the United States nor is likely soon to be.

Quite different is that species of state interference which puts in the hands of state officers or boards the performance within a metropolitan area of functions normally entrusted to local control. Such a unit as the metropolitan police district of London is to be justified as a national necessity, not as an expedient for ordinary police administration. The metropolitan district commission in Massachusetts which provides parks, water supply, main sewers and more recently regional planning in the metropolitan area of Boston, is, it is true, appointed by the governor and has, nevertheless, found genuine popular support. Perhaps this is to be explained by the fact that nearly half the population and a decided preponderance of the leadership of Massachusetts is to be found within the district. There are a few other examples of such authorities, such as the Passaic Valley sewerage commission, [the] Milwaukee metropolitan sewerage commission and some port authorities, but there is no likelihood of the general adoption of this method of metropolitan government. It is too distinct a violation of the principle of home rule to be acceptable to the public. It means that the government of the districts is not responsible to the people who support it with their taxes. Nor is it any more acceptable to the political scientist. We have discovered no other way of qualifying a community for self-government than by allowing it to govern itself. To remove from local control governmental services in their nature of local



interest, is to weaken the self-governing capacity of the community. We must reject, therefore, direct state administration of metropolitan affairs as a general solution of the metropolitan problem.

In the absence of a comprehensive plan for dealing with the problems of the metropolis frequent resort has been had to *ad hoc* authorities. Apart from the perfectly obvious objection that only a flock of such authorities could give us the general solution we seek, they are usually open to attack on more specific grounds. Where the governing body of an *ad hoc* metropolitan authority is made up of representatives chosen by the cities concerned, it almost inevitably becomes unwieldy and thereby incapable of vigorous and responsible administration of complicated and difficult affairs. The metropolitan water board of London, for example, consists of 66 members representing the London county council, the city corporation, the county councils of the neighboring counties and numerous county-borough, borough and urban-district councils. Its accomplishments have been sufficiently satisfactory, but its best friends admit it is too large, that it is fortunate in having nothing more complicated to administer than a going water service. There is also an unfortunate irresponsibility on the part of such an indirectly selected body, a difficulty that increases with the size of the body and the number of units of local government represented.

Where, on the other hand, the governing body is selected directly by the people it is objected that elections, already too frequent, are unduly multiplied. If there were to be several such authorities, as there must be, completely to solve the problem of metropolitan government, this objection would become overwhelming. It is almost impossible to induce the public to interest itself in local elections now. We cannot afford to diffuse further an interest already so attenuated. I would not be understood to condemn the establishment of particular *ad hoc* metropolitan authorities. The gravest reasons have usually prompted their creation. The rapid increase in their number in the last few years is our best evidence of the reality of the metropolitan problem. Many of them, among which may be mentioned the Montreal metropolitan commission, the sanitary district of Chicago, and numerous port authorities, are to be credited with a liberal measure of success. Nevertheless, the fact remains that the creation of *ad hoc* authorities offers no thorough and permanent solution of the metropolitan problem. . . .

It is easy to see that we are forced back upon the original proposition that our need is a new method. But what is that method to be? A political scientist is on solid ground when he points out the defects only too evident in tried devices. He imperils his reputation when he suggests a new device. With diffidence, however, and in the hope that my proposal may at least serve as a starting point for more constructive thought, I propose the creation of a new unit of local government—the *Region*. Its size should vary with conditions. States predominantly rural might well get along without it altogether. It should be centered usually upon some relatively large urban community, and include the territory socially and economically dependent on it, although I would by no means bar such units as the "Niagara Frontier." Regard should be had at the same time to historic origins and sentimental ties. My proposition has nothing in common with the movement for *regionalisme* in France nor with the devolution of parliamentary functions to regional governments as has sometimes been urged in England. G. D. H. Cole, in his *Future of Local Government*, has suggested something of the thought I have in mind, but on a grandiose scale, and with communistic implications which I would emphatically repudiate. The areas I would establish are smaller, more numerous, and more subject to variation than are his. I can see no reason why small regions should not center on Albany, Syracuse, and Rochester as well as large ones on New York and Chicago.

My suggestion of the *region* is based upon the commonly neglected fact that the question of metropolitan areas is curiously interrelated with that of efficient areas for rural local government. The cost of the services expected of a rural government have in recent years mounted with extraordinary rapidity. Highways, which in these days pop first into the mind in this connection, are in reality but one item in the swelling total. These increasing costs are, as is well known, wiping out by inexorable economic pressure the small units of rural local government. Parishes, rural communes, towns and townships are doomed by their financial incapacity. Even the larger areas such as our American counties are often unable to meet the demands upon them. For years our municipal reformers, their thought centered on urban needs, have been crying "city and county separation." They based their arguments on English practice. For nearly a century it has been a principle of English local government policy to make every city of 50,000 a county-

borough, in other words to separate it, governmentally, from the rural area. A like principle at the same time decreed that all the built-up area around a borough should as rapidly as possible—exception being made of London—be included in the borough. These time-honored practices have suffered a check—for under their operation the population and taxpaying capacity of the counties were melting away. We have perhaps been fortunate that our cry for city-county separation from the rural areas around them is only robbing rural Peter to pay urban Paul.

From this dilemma there are only two avenues of escape: *First*, state subsidies to rural local government, with accompanying state control; *second*, the creation of large areas of local government centering upon and including the cities—i.e., *regions*.

Accepting, for the moment at least, the latter alternative we have a unit capable of handling

1. Planning, including zoning and the preservation of suitable forest and shore reservations.
2. Transportation, including street railways, buses and rapid transit lines.
3. Traffic, including highway construction and maintenance.
4. Water supply and electric energy.
5. Drainage.
6. Certain aspects of police, health and charity administration.

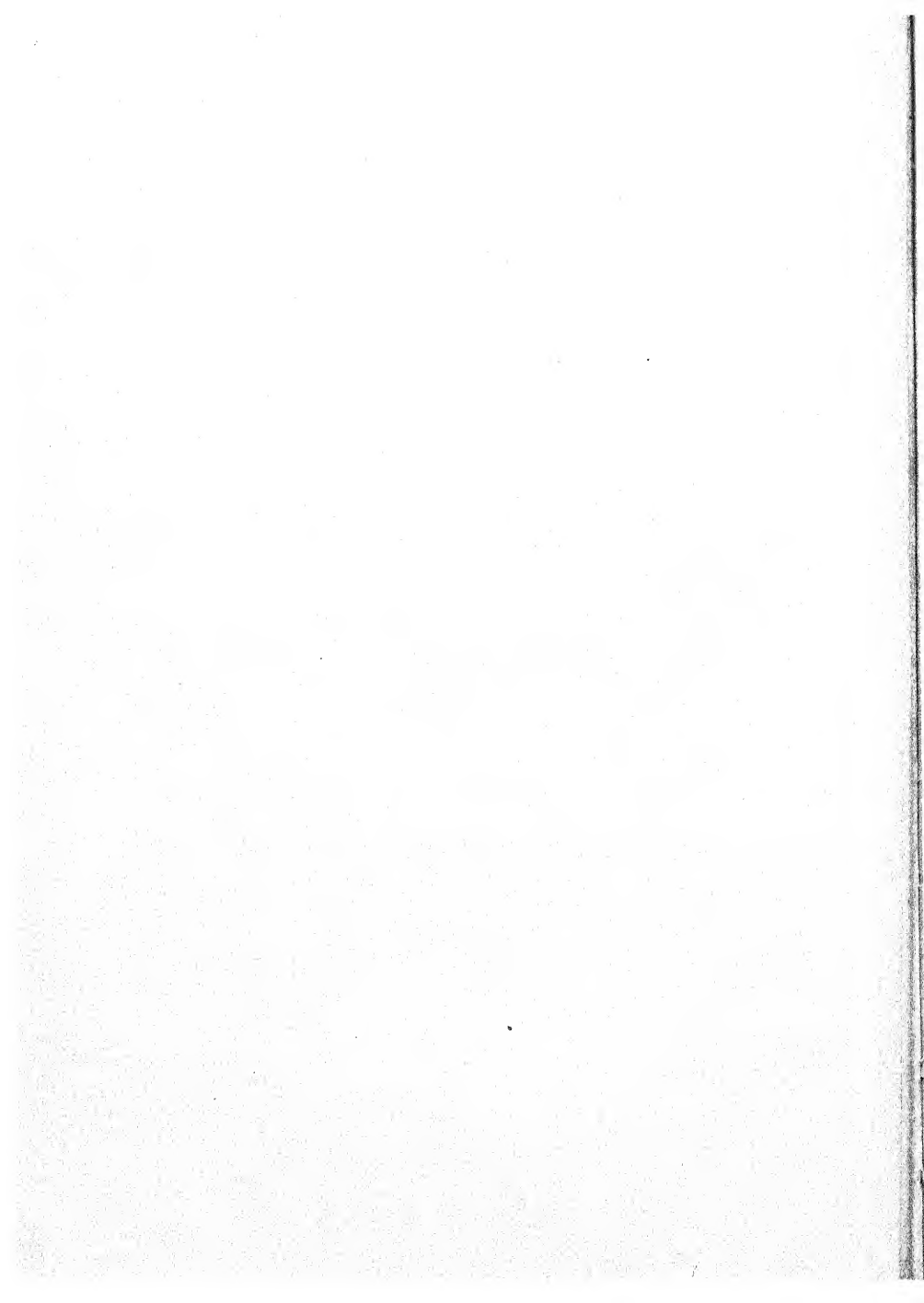
Such a unit can be effectively governed by a council, say of nine, elected at large by proportional representation, thus minimizing the evil of multiplied local elections. The financial burdens of the *region* can be equitably distributed by the creation of special assessment districts for such small part of its services as is not of direct benefit to the whole *region*. A regional system will not entirely obviate the necessity of state contributions as a means of equalizing local burdens in such matters as education and highway construction. The *region*, however, will be financially competent and will by the performance of the functions entrusted to it give ample relief to the overburdened rural treasuries. Within the *region* the relations of city and county can be readjusted without hardship.

Perhaps of equal importance to the possibility of successful operation is the fact that the creation of the *region* will not arouse the bitter popular opposition which meets every proposal for city growth by annexation. In the first place, it is not a means to the aggrandizement of any city. If, for example, a region were created in the Hudson-Mohawk valleys—centering on Albany it

would not change the census standing of Albany, Troy, Schenectady, or any other city. It would affect the existence, dignity and essential independence of none of the existing units of government. The functions entrusted to it would be strictly limited and would leave the lesser units a full complement of powers and duties. They would not be reduced to the unhappy state of London metropolitan boroughs, certainly not to mere election districts like the boroughs of New York. What is proposed is a uniform system applicable throughout the whole state—a systematic grouping of communities with common interests. The fact that it would relieve the financial difficulties of rural areas and small cities, would naturally tend to reconcile them to the surrender of a few functions to the *region*. I make no promises—no one dares promise what the popular response will be to any suggestion—but I hold out these reasonable hopes.

The foundation of regional government is being laid, unwittingly almost, by the city planners. They are daily popularizing the idea of the *region*. Prophets of the new and better day, they have “cast off their moorings from the habitable past” and set forth to chart the course of progress. The alluring idea of the regional plan is already accepted by the enlightened and imaginative. The time is coming, however, when you must take deliberate thought of regional government. For without regional government the fabric of your dreams will fray out to tattered fragments. Governing is a matter of infinitely more difficulty, not intellectually but humanly, than planning. Regional planning encounters no more opposition than the propositions of speculative philosophy. Those who understand approve, and those who do not understand remain indifferent. The proposition of regional government, however, at once arouses antagonisms. It is a new political idea, and many (conservatives and radicals alike) are suspicious of new political ideas. It means the breaking up of vested political interests—some readjustment in party activity, some pruning of the tree of patronage. You will have beautiful regional plans on paper long before you have regional organizations fit to carry them out. The conclusion is inescapable. If it is worth while to plan for streets and parks and terminals, it is worth while to plan for institutions of government. It is the way of specialists to take for granted everything outside their specialty. It will not do, however, to assume that arterial highways may be planned but that government just happens. The one requires and deserves plan-

ning as much as the other. Two great mementos the civilization of each age has left to its successors—its structures and its institutions. If there is any difference in the permanence of these memorials it is to the advantage of institutions. Men will be reading the Code of Justinian long after the last three-cornered brick has crumbled from the Pantheon. Let us plan our physical surroundings and our institutions so that they may live on worthily together.



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